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No. 02-

In the
SUPREME COURT OF THE UNITED STATES

DONALD ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

STEVEN L. MANNING,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

ON PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The statements at issue in this case were made by the respondent after an arrest warrant had been issued, but before the filing of an information and before any court appearance, such as a preliminary hearing or arraignment. The question posed is:

Does the mere issuance of an arrest warrant by a court constitute the initiation of adversary court proceedings to which the Sixth Amendment right to counsel attaches?

PARTIES TO THE PROCEEDING

Petitioner, Donald Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent Steven Manning is confined. Superintendent Michael Bowersox, Roper's predecessor, was the respondent in the habeas action in the district court and the appellee in the court of appeals.

Respondent Manning is a prisoner in state custody. He was the petitioner in the habeas corpus action in the district court and the appellant in the court below.

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Petitioner, Superintendent Donald Roper seeks a writ of certiorari to review the judgment of the court below reversing the denial of Respondent Manning's application for writ of habeas corpus.

OPINIONS BELOW

The November 8, 2002 panel opinion of the United States Court of Appeals for the Eighth Circuit, from which petitioner seeks review, is reported at 310 F.3d 571 (8th Cir. 2002) and is published in the Appendix at App. A-2. The April 17, 2001 order of the United States District Court for the Western District of Missouri denying the petition for writ of habeas corpus is published at App. A-14, but it is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on November 8, 2002. The court below denied the petition for rehearing with suggestions for rehearing en banc on December 31, 2002 (App. A-75). Petitioner invokes this court's jurisdiction under 28 U.S.C. §1254(1). The court below had jurisdiction under 28 U.S.C. §2253(c), §2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> [Nor] shall any state deprive any person or life, liberty or property without due process of law . . . .

28 U.S.C. §2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Missouri Supreme Court Rule 22.01 (effective January 1, 1980):

> Felony proceedings may be initiated by complaint filed in any court having original jurisdiction to try misdemeanors, or by indictment.

Missouri Supreme Court Rule 22.03 (effective January 1, 1981):

> Upon the filing of a complaint and a finding by the court that sufficient facts have been stated therein to show probable cause that a felony has been committed by the defendant or upon the return of an indictment charging the commission of a felony, a warrant for the arrest of the defendant shall be issued unless the court orders the issuance of a summons. If the defendant is a corporation, a summons instead of a warrant shall be issued.

STATEMENT OF THE CASE

The question here relates to the admission at trial of statements made by Respondent Manning after a warrant was issued for his arrest, but before he appeared in court after arrest.

1. Kidnapping

On January 22, 1992, the cause against Manning went to trial before a jury. The evidence adduced at trial demonstrated the following:

Charles Ford was a drug dealer who owned The Irish Crook Tavern at Fifth and Walnut in Kansas City, Missouri. Anthony Mammolito's wife owned Jaime's Lounge across the street. Mammolito knew Ford. Ford's brother-in-law, Goldyn, was a frequent patron of Jaime's Lounge. Goldyn told Mammolito that he thought Ford was worth a lot of money and had access to $200,000 to $250,000 because of his drug dealings.

In early 1984, Mammolito went to Chicago to recruit individuals to help him kidnap Ford. Mammolito went to the house of a former fellow prison inmate, Thomas McKillip, and asked McKillip's help in kidnapping Ford. McKillip made a telephone call. About 15 to 20 minutes later, Manning showed up at McKillip's house. After discussing the kidnapping plans, Manning recruited Gary Engel to help with the kidnapping. The next night, Manning, Engel, McKillip and Mammolito met at Engel's house and discussed the kidnapping. Mammolito then returned to Kansas City.

A week or two later, McKillip drove to Kansas City and met with Mammolito. He told Mammolito that Manning and Engel would be flying from Chicago that night. McKillip showed Mammolito the paraphernalia that he had brought with

him, including police radios for cars, hand-held radios, an assortment of badges from law enforcement agencies, search warrants, a red light, handcuffs, pistols, and a utility line repairer's belt.

Later that night, Sharon Dugan, Engel's ex-wife, took Engel to the airport so that he could travel to Kansas City. Mammolito and McKillip picked up Manning and Engel at the Kansas City airport.

Mammolito, McKillip, Manning and Engel began following Ford. They followed him to the airport and watched him board a plane. They later learned that Ford's mother-in-law had died and that Ford was traveling to attend her funeral. Because nothing could be done until Ford returned, Manning and Engel went back to Chicago.

A couple of days later, Sharon Dugan again took Engel to the airport so that he could travel to Kansas City. Engel returned to Kansas City with Manning and again met Mammolito and McKillip. Mammolito and McKillip dropped Manning and Engel off in the Fairfax area of Kansas City, Kansas, for the purpose of stealing a car to use in the kidnapping.

Mammolito and McKillip then went to the house of Ford's sister, Carolyn Heldebrand, to plant a bugging device on Heldebrand's telephone. McKillip put on the utility line repairer's belt and a "Ma Bell" identification and climbed a telephone pole across the street. McKillip attached a bugging device to Heldebrand's telephone line. An FM radio could pick up the device's signal.

Later Mammolito, McKillip, Manning, and Engel met at a "safe house." They installed a red light, police radios, a police scanner and an antenna to a car stolen by Manning and

Engel. They then began watching Ford's apartment in Kansas City. Manning and Engel were in the stolen vehicle in one parking lot, and Mammolito and McKillip were in McKillip's car in another parking lot.

Ford and a friend, Mark Harris, arrived at the apartment at about 2:30 to 3:00 a.m. As they were getting out of Ford's truck, Manning and Engel ran up to them displaying badges and guns and yelling that they were DEA agents and that Ford and Harris were under arrest. Ford and Harris were told to face the truck and to put their hands on the truck as Manning and Engel searched them. They took a gun from Ford's pants. They handcuffed Ford and Harris and placed them in the back seat of the stolen car. They placed duct tape over Ford's and Harris' eyes.

Manning and Engel drove the stolen car with Ford and Harris in it. McKillip drove Ford's truck, and Mammolito drove McKillip's car back to the "safe house." Once there, Ford and Harris were handcuffed to a pole in the garage. Mammolito avoided Ford because Ford knew him and knew his voice. One of the kidnappers informed Ford that there was a contract on his life, and that someone had offered $100,000. Ford told them that he did not think he could come up with $100,000, but the kidnappers told him to come up with what he could.

The kidnappers allowed Ford to make some phone calls to raise money. They planned to pick up any money Ford could raise at Heldebrand's house. Heldebrand gathered $5000 and put it into a sack. Ford's friends went to Ford's apartment and picked up a briefcase full of money and dropped it off at Heldebrand's house.

Manning drove Ford's truck to Heldebrand's house to pick up the money. Heldebrand handed him a sack of money.

When he returned to the safe house, Manning was angry about the small amount of money in the sack, and he threatened to kill Ford and Harris. He hit Harris with a pipe. Ford called his sister and told her that she had forgotten the briefcase full of money. Manning went back to Heldebrand's house and picked up the briefcase.

In total, the kidnappers received about $30,000 to $50,000. They informed Ford that they would be back in about 30 days to collect the rest of the money. They divided up the money and left a 10 % share in the freezer of the safe house for the tipster, Goldyn. Engel also took one of Ford's rings.

The kidnappers then put Ford and Harris in a car, and Manning and Engel drove them to a cemetery on Blue Ridge. They removed the handcuffs on Ford and Harris but bound their hands with duct tape. They told Ford and Harris to sit down for a while before trying to get loose. They left Ford's truck nearby.

Manning and Engel drove away and headed to Kansas City International Airport to return to Chicago. Engel gave Sharon Dugan Ford's ring and told her that he had gotten it from a person they had kidnapped in Kansas City. Dugan heard Manning and Engel discuss pretending, during the kidnapping, to be DEA agents.

Ford and Harris removed the duct tape and drove Ford's truck to Ford's bar (App. A-56 to A-60).

2. Discovery

Ford and Harris did not immediately seek police help because of Ford's drug dealings and because they were concerned that the kidnappers would return in 30 days. But over the next months and years, police encountered physical

evidence of the crime.

In February 1984, Lillian Schoenberger's car, a 1984 Chevrolet Caprice, was stolen from the Fairfax area of Kansas City, Kansas. Police found the car on July 12, 1984, at Kansas City International Airport. A key was jammed in the car's ignition, and a hole, which could have held an antenna or similar device, had been cut in the car's rear quarter panel.

Also in early 1984, a Southwestern Bell Telephone Company technician removed a bugging device from a telephone pole near Heldebrand's house. The Federal Bureau of Investigation found a similar device in Engel's apartment in Chicago in August 1990.

In 1986, an FBI agent searched a storage locker belonging to Manning in Chicago. He found a paper with McKillip's name on it, two or three Illinois identification documents, a Minnesota driver's license, a Chicago police uniform badge, a Cook County Sheriff's Department badge, a document with Manning's picture and the name Steve Rosenbloom on it, assorted documents with other people's names on them, a document with Harris' name on it and descriptive information about him, a telephone bugging device, a police-type transmitter and receiver, and a portable antenna. Manning admitted that the items belonged to him.

On November 20, 1989, Buffalo Grove, Illinois, police received Ford's ring from Sharon Dugan, who said that Engel gave her a ring and told her that he had gotten it from a person they had kidnapped in Kansas City.

3. Identification, Arrest, and Indictment

Ford acknowledged the kidnapping to police in 1990, when he was negotiating a guilty plea to a drug charge.

In June 1990, Heldebrand identified Manning in a photograph lineup as the man who picked up the ransom money.

On July 20, 1990, the assistant prosecuting attorney of Clay County, Missouri filed a complaint in the Circuit Court of Clay County, Associate Division VI See Missouri Supreme Court Rule 22.01 (effective January 1, 1980) (App. A-104). That same day, the associate circuit court found probable cause that a felony had been committed by respondent, and the court issued a warrant for respondent's arrest (App. A-91). See Missouri Supreme Court Rule 22.03 (effective January 1, 1981).

Manning was arrested in Illinois and placed in the Cook County Jail on July 26, 1990 (App. A-4).

Sylvia Herrera knew Manning through her boyfriend, Tommy Dye. Dye asked her to help provide Manning an alibi for certain dates in February 1984. Herrera saw Manning in jail, spoke to him on the telephone, and received letters from Manning. Herrera went to a library and got copies of the *Sun Times* newspaper for Manning so that he could review what movies and events occurred during the period in question. Manning asked Herrera for information about her family. He instructed her to say that Manning was with her family during the days in which the kidnapping occurred and that they went to movies and did other things together. Manning told Herrera that she and her family would be paid thousands of dollars for providing him with an alibi.

Respondent appeared upon the warrant on September 28, 1990 (App. A-91). Missouri Supreme Court Rule 22.07(a) (effective January 1, 1980). Respondent had a preliminary hearing on October 9, 1990 (App. A-92). Missouri Supreme Court Rule 22.07(c) (effective January 1, 1980). The associate

circuit judge found probable cause and respondent was bound over for arraignment on October 15, 1990 (App. A-92). Missouri Supreme Court Rule 22.07(d) (effective January 1, 1980). The state filed an information on October 15, 1990, and respondent pled "not guilty" at the October 15, 1990 arraignment (App. A-92). Upon the state's motion, the case was dismissed on April 19, 1991 (A-94).

Meanwhile, on March 20, 1991, Manning was charged by indictment with two counts of kidnapping, §565.110, RSMo. 1986, and two counts of armed criminal action, §571.015, RSMo. 1986 (App. A-95).

4. Trials and post-trial proceedings

Manning's first trial ended in a mistrial.

At his second trial, Manning neither testified in his own behalf nor presented the testimony of other witnesses. At the close of the evidence, instructions and arguments of counsel, the jury found that respondent was guilty as charged. After finding respondent to be a prior offender, the trial court sentenced him to two life sentences for the counts of kidnapping and two fifty year sentences for the counts of armed criminal action. The sentences were ordered to run consecutively.

On May 21, 1992, respondent filed a motion to vacate, set aside or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. After appointment of counsel and amendment of the motion, the circuit court held an evidentiary hearing. The motion court then denied respondent's Rule 29.15 motion (App. A-76).

Respondent appealed to the Missouri Court of Appeals for the Western District. The Missouri Court of Appeals

affirmed respondent's conviction and sentence and affirmed the denial of post-conviction relief in the consolidated appeal (App. A-55).

Manning then sought a writ of habeas corpus from the United States District Court for the Western District of Missouri. After two amendments of the petition and discovery, the district court ordered the application for writ of habeas corpus denied (App. A-14).

Manning appealed to the United States Court of Appeals for the Eighth Circuit. That court concluded that Manning's Sixth Amendment right to counsel attached on July 20, 1991, when a complaint was filed in the Clay County, Missouri Associate Circuit Court. According to the court of appeals, the statements made to Sylvia Herrera were inadmissible because the taking of those statements violated Manning's Sixth Amendment right to counsel (App. A-6 to A-10).

REASONS FOR GRANTING THE WRIT

"In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). This case presents the question of what constitutes the point at which "adversary judicial proceedings have been initiated." The Eighth Circuit has placed that point much earlier than – and thus in conflict with – the placement by other courts. Knowing at what point the accused has a right to counsel is critical for law enforcement officers and for courts.

A. The Eighth Circuit held that "adversary judicial proceedings" begin on the day a criminal complaint is filed and an arrest warrant issued – long before any formal charge, preliminary hearing, information, indictment, or arraignment.

The Eighth Circuit found that information obtained by Sylvia Herrera from respondent while he was at the Cook County (Illinois) Jail was obtained in violation of respondent's Sixth Amendment right to counsel (App. A-6 to A-10).

Manning was jailed in Cook County after the Clay County Associate Circuit Court issued a warrant for his arrest. His detention there ended when he was taken to Clay County, Missouri. Only *after* Manning's arrival in Clay County – and thus after the conversations with Herrera took place – did the proceedings that juxtaposed Manning against the State take place. Only after his return to Clay County did Manning have a preliminary hearing (October 9, 1990), or an arraignment on the information (October 15, 1990).

The Eighth Circuit relied principally on this Court's decision in *Maine v. Moulton*, 474 U.S. 159 (1985). There this Court said that Sixth Amendment rights apply not just at trial, but at other "'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" 474 U.S. at 170, quoting *United States v. Wade*, 388 U.S. 218, 224 (1967). The Court did not precisely identify those "critical stages," but it did explain that "adversary criminal proceedings," as the Court had explained twice before, exist once "the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. at 689, quoted in *Moulton*, 474 U.S. at 171, and in *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

In the Eighth Circuit's view, the mere filing of a criminal complaint and the issuance of an arrest warrant creates an "adversary criminal proceeding." That view is contrary to the views expressed by other courts.

B. The Missouri Supreme Court has held under the same law being applied by the Eighth Circuit, "adversary judicial proceedings" do not begin until there is a formal charge, preliminary hearing, indictment, information, or arraignment.

In *Kirby v. Illinois*, this Court summarized its prior decisions regarding the point at which Sixth Amendment rights attach, and listed the proceedings to which the Sixth Amendment has been applied: "formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689. In fact, until the Eighth Circuit's decision here, courts

have consistently defined the point as one much later than the mere issuance of an arrest warrant.

The Missouri Supreme Court has determined that the right to counsel attaches upon indictment or information. That determination is most clearly stated in *State v. Beck*, 687 S.W.2d 155 (Mo. banc 1985), *cert. denied*, 476 U.S. 1140 (1986).

In *Beck*, the Missouri Supreme Court used this Court's teachings in *Kirby v. Illinois* and *Brewer v. Williams*, 430 U.S. 387 (1987) in resolving whether a defendant's Sixth Amendment right to counsel had attached in circumstances that parallel those in this case. The statements in dispute were made after "prosecutor Kohl, in an ex parte proceeding, swore out an affidavit to obtain a warrant for defendant's arrest," but before the defendant arrived back in Missouri after an out-of-state arrest. The court defined the point of attachment using the words of this Court in *Kirby*, then held that the point had not been reached merely because of the affidavit, warrant, and arrest:

> Attachment of the right to counsel occurs at the initiation of adversary judicial proceedings against an accused "by way of *formal charge, preliminary hearing, indictment, information or arraignment.*" [*Kirby v. Illinois*, 406 U.S. at 689] . . . When defendant was arrested and gave statements to the deputies . . . , *none* of these procedural events had transpired. It was not until September 29, 1981 that an information was filed formally charging defendant with two counts of capital murder.

687 S.W.2d at 160 (emphasis in original). The court continued, again using language that with little modification would fit the

facts here:

> At the time these statements were made, the only document that had been filed was an affidavit sworn out by the prosecuting attorney – for the sole purpose of securing an arrest warrant with which to apprehend defendant who was over one thousand miles away in Florida. Defendant would have us color this ex parte event as the initiation of adversary judicial proceedings sufficient to trigger his Sixth Amendment right to counsel. In *Morris v. State*, 532 S.W.2d 455 (Mo. banc 1976), the Court, citing *Kirby* with approval, determined that the issuance of an arrest warrant did not amount to the initiation of adversary judicial proceedings – as defined within the framework of *Kirby*. *See also State v. Boggs*, 634 S.W.2d 447 ([Mo. banc] 1982) (Sixth Amendment right to counsel attached after indictment or information or commencement of adversary criminal proceedings).

State v. Beck, 687 S.W.2d at 160.

The Missouri Supreme Court's holdings in *Beck*, *Morris*, and *Boggs* were consistent not only with *Kirby*, but with the significance of a criminal "complaint" under Missouri law. The role of such a "complaint" is limited. The contents of the complaint are listed in Missouri Supreme Court Rule 22.02 (effective January 1, 1980). A complaint and a judicial determination of probable cause are necessary for the issuance of an arrest warrant. Missouri Supreme Court Rule 22.03 (effective January 1 1981). "Though the complaint may initiate felony proceedings, it is merely a prelude to felony prosecution, for in felony cases the complaint serves as a precursor to the

preliminary hearing required by § 544.250. Only after a preliminary hearing in which the magistrate finds probable cause to believe the prisoner is guilty, may an information be filed in a felony case." *State ex rel. Morton v. Anderson*, 804 S.W.2d 25, 26 (Mo. banc 1991). "An information instigates a prosecution against an alleged felon, and the mere filing of a complaint does not confer jurisdiction upon a court to adjudicate the offense." *Id.* at 26.

The Eighth Circuit's decision is directly contrary to the Missouri Supreme Court's holdings.

C. Federal courts have held that in federal criminal law, "adversary judicial proceedings" do not begin until there is a formal charge, preliminary hearing, indictment, information, or arraignment.

The procedure provided by Missouri rules and the cases describing those rules is remarkably similar to the procedure enacted by Congress in the Federal Rules of Criminal Procedure. In the section entitled Preliminary Proceedings, there is Federal Rule of Criminal Procedure 3 which describes the complaint in the federal process. Federal Rule of Criminal Procedure 4 discusses the issuance of an arrest warrant upon the filing of a complaint. That rules corresponds with Missouri Supreme Court Rule 22.03 (effective January 1, 1981).

Given the similarity between the Missouri rules and the federal rules, it is unsurprising that the decisions of the various federal circuit courts of appeals echo the language and the holding of the Missouri Supreme Court in *Beck*.

One of those decisions is from the Eighth Circuit itself: *United States v. Moore*, 122 F.3d 1154 (8th Cir. 1997), *cert. denied*, 522 U.S. 1135 (1998). There the Bureau of Alcohol, Tobacco and Firearms had filed a criminal complaint against

the defendant in federal district court. An affidavit by a federal agent accompanied the complaint. A United States Magistrate Judge found probable cause and issued a warrant for the defendant's arrest. *Id.* at 1155. Between the issuance of the warrant and the indictment, a federal agent subsequently obtained statements from the defendant. On appeal, court rejected the defendant's claim that his Sixth Amendment right to counsel attached with the filing of the criminal complaint. The court construed Federal Rule of Criminal Procedure 3 and determined that the federal complaint was not a formal charge that gives rise to the Sixth Amendment right to counsel.

> As explained in *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011, 108 S.Ct. 1742, 100 L.Ed.2d 205 (1988), and *United States v. Duvall*, 537 F.2d 15, 22 (2nd Cir. 1976), *cert. denied*, 426 U.S. 950, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976), the principal function of a complaint under Fed.R.Crim.P. 3 is to serve as the basis for a judicial determination of probable cause for an arrest warrant under Fed.R.Crim.P. 4(a). Complaints under Fed.R.Crim.P. 3 are, therefore, by definition, issued before an arrest occurs. If an arrest does not trigger the Sixth Amendment right to counsel, we are unable to see how the issuance of a complaint that serves as the basis for a probable cause determination authorizing a later arrest would trigger that right. Because warrantless arrests are sometimes authorized, moreover, we note that if we were to hold that the right to counsel does attach when a complaint under Fed.R.Crim.P. 3 issues, we would be granting greater protection to persons arrested with warrants than without, thus discouraging the use of warrants in making

> arrests for federal crimes. *See Duvall*, 537 F.2d at 22. We therefore hold that the issuance of a complaint under Fed.R.Crim.P. 3 is not the type of "formal charge" contemplated by *Kirby*, 406 U.S. at 689, 92 S.Ct. at 1882 (plurality opinion), and that a person's Sixth Amendment right to counsel does not attach upon the filing of such a complaint. *See, e.g., United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988) (*per curium*), *cert. denied*, 488 U.S. 897, 109 S.Ct. 241, 102 L.Ed.2d 230 (1988); *Pace*, 833 F.2d at 1312; and *Duvall*, 537 F.2d at 22.

United States v. Moore, 122 F.3d at 1156. The Eighth Circuit reached the same conclusion in *Von Kahl v. United States*, 242 F.3d 783, 789 (8th Cir. 2001) where it determined that the defendant's Sixth Amendment rights did not attach until the preliminary hearing.

Other circuits have reached the same conclusion.

In *United States v. Duvall*, 537 F.2d 15, 22 (2nd Cir.), *cert. denied,* 426 U.S. 950 (1976), the court focused on the limited role of the complaint under Federal Rules of Criminal Procedure 3 and 4 and determined that there was no right to counsel immediately upon arrest pursuant to a warrant.

In *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000) (*en banc*), *cert. denied*, 121 S.Ct. 1388 (2001), the Ninth Circuit said it was "loath to engraft some new pre-indictment proceeding onto the rule" in *Kirby*. Accordingly, the Sixth Amendment right to counsel attached upon indictment by the grand jury, not at a preindictment deposition. Id. Earlier, in *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011 (1988), the Ninth Circuit applied the rule and analysis of the Second Circuit in *Duvall*.

And in *United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988), the Eleventh Circuit concluded that the mere filing of a federal complaint and issuance of an arrest warrant did not give rise to the right to counsel.

D. None of the decisions cited by the Eighth Circuit in support of its conclusion set the point of Sixth Amendment attachment as early as the filing of a complaint or affidavit and issuance of an arrest warrant.

The Eighth Circuit below cited four cases to support its position (App. A-7). None of those cases, however, hold that a complaint under Missouri Supreme Court Rule 22.02 or Federal Rule of Criminal Procedure 3 initiated the Sixth Amendment right to counsel.

In *Chewning v. Rogerson*, 29 F.3d 418, 420 (8th Cir. 1994) (App. A-7), the litigants assumed that the right to counsel attached after a formal criminal complaint was made by the Iowa prosecutor. *Id.* There was no holding by the Court of Appeals to that effect. Id.

Smith v. Lockhart, 923 F.2d 1314, 1318 (8th Cir. 1991), concerned an "omnibus pretrial hearing." Id. The defendant was arraigned on October 8, 1986. *Id.* at 1317. The omnibus pretrial hearing occurred on November 6, 1986. *Id.* Thirteen days later, the defendant went to trial. *Id.* at 1318. In *Smith*, the court only held that a post-arraignment proceeding included a right to counsel.

And in *Gilmore v. Armontrout*, 861 F.2d 1061, 1070 (8th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989), all the court did was to quote *Kirby*. The language the *Gilmore* court quoted did not stand for the proposition that the right to counsel attaches upon the signing or filing of a complaint. What this

Court said in *Kirby* was that there was no consensus, yet, on what constituted the beginning of an "adverse judicial proceeding":

> But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary criminal proceedings –whether by way of formal charge, preliminary hearing, indictment, information or arraignment.

Kirby, 406 U.S. at 689. This Court did not refer to "complaint" or "affidavit." Nor did it do so in any of "those cases" that it referred to in *Kirby*. In fact, they all dealt with the right to counsel at a later stage. *Powell v. Alabama*, 287 U.S. 45 (1932) (arraignment); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial); *White v. Maryland*, 373 U.S. 59 (1963) (preliminary hearing); *Massiah v. United States*, 377 U.S. 201 (1964) (after indictment); *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967) (post-indictment lineups); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing). In none of those cases did the court hold, or even suggest, that the initiation of adversary judicial proceedings began with a complaint.

The final case cited by the court of appeals was *Maine v. Moulton*, 474 U.S. 159, 171 (1985) which does not support the extension of the Sixth Amendment right to counsel to filing of a complaint or issuance of a warrant. Instead, the defendant had been indicted before he made his statements. *Id.* at 161. None of the cases cited by the court of appeals support the courts' extension of the Sixth Amendment right to counsel.

E. The Eighth Circuit's holding creates problems for law enforcement and defendants.

Both law enforcement officials and defendants need to know when Sixth Amendment rights attach. Today, those in the Eighth Circuit know that they attach at the time of an arrest warrant issues. Those in the Second, Ninth, and Eleventh Circuits know that it does not attach at that point. Those in other circuits simply do not know. Federal, state and local police need to know how they can obtain information that can be used at a later criminal trial. Those arrested need to know at what point they can demand counsel. Because of the Eighth Circuit's decision, the knowledge is simply not available in much of the country.

And the situation is problematic even in the Second, Eighth, Ninth, and Eleventh Circuits. After all the questioning at issue here took place not in the Eighth Circuit, but in the Seventh. Law enforcement officers trained in one circuit according to that circuit's rule may be violating the rule in another circuit where the evidence is ultimately used. The court should grant the petition and eliminate the confusion and conflict inherent in such a situation.

The Eighth Circuit's rule will be problematic even in cases where only that circuit is involved. As explained by the Second Circuit in *United States v. Duvall*, the Eighth Circuit's rule creates a disincentive for the use of arrest warrants – a disincentive contrary to any social policy that the courts ought to encourage. 537 F.2d at 22.

CONCLUSION

For the foregoing reasons, petitioner prays the court grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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March, 2003

(2) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 02-

In the
SUPREME COURT OF THE UNITED STATES

DONALD ROPER,
Superintendent , Potosi Correctional Center,
Petitioner,

v.

STEVEN L. MANNING,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3246

STEVEN L. MANNING,	)	
	)	
Appellant,	)	
	)	Appeal from the United States
v.	)	District Court for the Western
	)	District of Missouri.
MICHAEL BOWERSOX, Superintendent; Jeremiah (Jay) Nixon, Attorney General, State of Missouri,	)	
	)	
	)	
	)	
	)	
Appellees.	)	

Submitted: September 9, 2002

Filed: November 8, 2002

Before WOLLMAN, HEANEY and BYE, Circuit Judges.

HEANEY, Circuit Judge.

Steven Manning appeals the district court's[1] denial of his petition for a writ of habeas corpus. We affirm in part and reverse in part.

---

[1]The Honorable Ortrie D. Smith, United States District Court for the Western District of Missouri.

BACKGROUND

In February of 1984, Charles Ford and Mark Harris were kidnapped at gunpoint and held for ransom. Once released, Ford and Harris did not immediately report the crime because Ford, an admitted drug dealer, was concerned that law enforcement might focus on his own criminal activity. When they did report the abduction several months later, they stated they could not identify their captors because they were blindfolded during the kidnapping. With no information pointed to suspects, the case was not pursued.

In 1989, the investigation was reopened based on recent statements from a person alleging to be the ringleader, Anthony Mammolito. Mammolito implicated Manning, and Manning was formally charged in Clay County, Missouri Circuit Court on July 20, 1990.

Manning was arrested on the Missouri charges in Chicago on July 26, 1990, and held in Cook County Jail awaiting extradition to Missouri. Because Manning was also a suspect in an Illinois murder, the FBI planted a government informant in his cell to try to collect evidence about the Illinois crimes. The informant's agreement specified that he was not to elicit any information about Manning's pending Missouri charges. However, the informant did talk about the Missouri charges, and agreed to help Manning fabricate an alibi defense using the informant's girlfriend, Sylvia Herrera. The FBI then met with Herrera to go over what information she should attempt to elicit from Manning. Pursuant to her agreement with the FBI, Herrera began to record her conversations with Manning.

Manning was tried in October of 1991, but the jury locked, resulting in a mistrial. He was tried again in January of 1992. At this trial, Herrera testified extensively about her work

as a government informant and the plan to fabricate an alibi defense.

Also testifying at Manning's trial was Carolyn Heldebrand, the sister of one of the kidnapping victims. In 1990, as part of the investigation in this case, she was shown two photo line-ups. Manning was included in each line-up, and he was the only person whose picture appeared in both photo spreads. At trial, she testified that she was the one who paid the ransom, and she saw the perpetrator-Manning-during the ransom drop.[2]

On January 24, 1992, Manning was convicted of two counts of kidnapping and two counts of armed criminal action. Based on Manning's status as a prior offender, the court imposed consecutive life sentences on each of the kidnapping convictions and consecutive fifty-year sentences on each of the armed criminal action convictions. Manning exhausted his state court remedies through direct appeals and post-conviction proceedings. He then filed a petition for a writ of habeas corpus. The district court denied relief, but granted a certificate of appealability on essentially four issues: 1) whether the use of government informants after Manning was charged violated his constitutional right to counsel; 2) whether the government's pretrial identification tactics were impermissibly suggestive; 3) whether the substantial delay between the commission of the crime and the trial deprived Manning of due process; and 4) whether the government knowingly elicited perjured testimony at Manning's trial. Finding that Manning's right to counsel was violated by the government's use of informants, we reverse the

---

[2]Although Heldebrand had previously picked Manning out of the photo line-ups, she was not able to identify him as the kidnapper at either the pretrial deposition in this matter or the first trial.

district court on that ground, and affirm the district court regarding the identification and pretrial delay issues.[3]

DISCUSSION

I. STANDARD OF REVIEW

In habeas corpus cases, we are directed to issue a writ of habeas corpus where the lower court decision was, *inter alia*, "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1) (2002).

II. THE GOVERNMENT'S USE OF INFORMANTS

Manning claims that the government's use of Sylvia Herrera as an informant violated his constitutional right to counsel. Criminal defendants are guaranteed the right to counsel at all critical stages of criminal proceedings. Massiah v. United States, 377 U.S. 201, 205 (1964). "[T]he prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by

---

[3]Our decision on Manning's right to counsel claim is dispositive, but we still address the precharging delay and pretrial identification claims because these issues are likely to come up again if the government pursues a new trial. See United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996) (deciding non-dispositive issues that may arise at second trial for sake of judicial economy). As to Manning's claim that the government used perjured testimony at trial, the district court did not hold an evidentiary hearing on the matter, leaving our record incomplete. We believe the trial court, perhaps benefitted by an evidentiary hearing, will be in a better position to consider this claim than our court.

the right to counsel." Maine v. Moulton, 474 U.S. 159, 171 (1985). Consequently, the government may not, either directly or through its agents, deliberately elicit incriminating information from suspects without counsel present. Id. at 173-74.

It is undisputed that Herrera was acting as a government agent here, pursuant to her agreement with the FBI. However, the government suggests that no right to counsel attached because Manning was only charged by complaint, rather than indictment, when he spoke with Herrera. Our cases make no such distinction. See Chewning v. Rogerson, 29 F.3d 418, 420 (8th Cir. 1994) (holding filing of charges is a critical stage for sixth amendment purposes); Smith v. Lockhart, 923 F.2d 1314, 1318 (8th Cir. 1991) (listing criminal stages at which right to counsel attaches, including filing of complaint). The right to counsel attaches to interrogations conducted after the initiation of adversarial criminal proceedings against the defendant; it is of no import whether the proceedings were initiated by complaint or indictment. Moulton, 474 U.S. 159, 170 (1985); see also Gilmore v. Armontrout, 861 F.2d 1061, 1070 (8th Cir. 1988) (recognizing sixth amendment applies to "interrogation activities conducted 'at or after the initiation of adversary criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information or arraignment'") (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). The right to counsel attaches not only to direct confrontations by known government officers, but also "indirect and surreptitious interrogations" by covert government agents and informants. United States v. Henry, 447 U.S. 264, 272-73 (1980) (quoting Massiah, 377 U.S. at 206).

The district court recognized that the government is not involved in interrogation where a government agent merely acts

as a listening post.[4] Kuhlmann v. Wilson, 477 U.S. 436, 458-59 (1986). However, that is not the case here. Rather, similar to Moulton, the government here deliberately created a circumstance ripe for its agents to elicit incriminating statements from Manning.

In Moulton, one codefendant agreed to work as a government informant against the other codefendant. The informant wore a recording device in a meeting with the defendant. The police claimed that the recording device was worn not to elicit incriminating information, but instead for the informant's own safety. The Supreme Court found this argument unpersuasive: "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation . . . as is the intentional creation of such an opportunity." Moulton, 474 U.S. at 176.

In Manning's case, the government employed two informants to elicit incriminating information from Manning after he was charged. First, the government planted an informant in Manning's cell. Although the FBI told the informant to limit conversation to the Illinois investigation, rather than the charged Missouri crimes, he did not follow suit. The FBI sanctioned this activity through its continued use of the informant, and eventually encouraged him to get more information on the Missouri crimes. The informant then involved his girlfriend, Sylvia Herrera, by suggesting that

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[4]We note that the listening post in Kuhlmann was the defendant's jailhouse cellmate. Kuhlmann, 477 U.S. 439-40. While this fact is not dispositive, a fellow inmate certainly has a greater opportunity to simply "keep his ears open," id. at 439, than does an outsider who often must affirmatively initiate the contact with the jailed defendant.

Manning use her to create an alibi. Herrera then entered into an agreement with the FBI herself, whereby she began recording her conversations with Manning. These conversations took place by telephone and in person. Because Manning was in jail, Herrera initiated the personal visits by traveling to Cook County Jail. By using Herrera and her boyfriend as informants, the government exploited its opportunity to interrogate Manning in the absence of counsel. Any statements from these informants related to Manning's charged crimes should not have been admitted at trial.

The government contends that even if it was error to admit Herrera's statements at trial, Manning did not properly preserve this claim. The record indicates that Manning's trial counsel attempted to exclude Herrera's testimony by way of a motion in limine, but failed to renew the objection when Herrera's testimony was admitted at trial.

A motion in limine standing alone does not normally preserve an issue for appellate review. United States v. Lee, 274 F.3d 485, 493 (8th Cir. 2001). However, when an issue has been defaulted by trial counsel, the defendant may overcome this procedural bar by showing cause for the default and resulting prejudice. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Cause, in this respect, can include a showing of ineffective assistance of counsel. Id. at 753-54. Accordingly, we apply the familiar test of Strickland v. Washington, 466 U.S. 668 (1984), in order to determine if the performance of Manning's trial attorney was inadequate, and whether Manning was prejudiced by counsel's shortcomings.

Here, there can be no doubt that the performance of Manning's counsel was deficient. Counsel attempted to attack the admission of Herrera's testimony only through a motion in

limine.[5] The lack of a contemporaneous objection at trial allowed the government to proffer Herrera's testimony unfettered, despite being constitutionally inadmissible.

The record in this case also establishes that Manning was prejudiced by his trial attorney's performance. As a result of counsel's failure to object to Herrera's testimony, the government adduced evidence that Manning had attempted to create a false alibi defense. The prosecutor recognized the importance of this point in his closing, where he emphasized "[i]nnocent people don't need to fabricate alibis." (Trial Tr. at 657).

Manning has established cause for his procedural default because his trial counsel was ineffective. As for resulting prejudice, as discussed above, counsel here allowed the jury to hear damaging, inadmissible testimony from Herrera that Manning wanted to fabricate an alibi. Because there is a substantial likelihood that absent this testimony the trial result would have been different, Manning has shown prejudice resulting from the procedural default.

The government's use of informants here violated Manning's constitutional right to counsel. As a result, Herrera's trial testimony should have been suppressed. Manning is not procedurally barred from raising this claim because he has shown sufficient cause for the default and

---

[5]Manning now asserts that part of trial counsel's deficiency rests in the fact that he filed a motion in limine, where the more appropriate procedure would have been to file a suppression motion. Because we find that trial counsel was ineffective for not objecting to Herrera's testimony at trial, we need not address whether trial counsel's choice of pretrial motion was constitutionally deficient.

resulting prejudice. Accordingly, the district court erred in not granting Manning relief on this ground.

III. THE GOVERNMENT'S PRETRIAL IDENTIFICATION TACTICS

Manning argues that Carolyn Heldebrand's in-court identification was the product of an unduly suggestive pretrial identification procedure. In order to determine if identification testimony is admissible, the trial court must first determine if the pretrial identification technique was impermissibly suggestive. Manson v. Brathwaite, 432 U.S. 98, 110 (1977). "If so, then the court must decide whether, under the totality of the circumstances, the suggestive confrontation created a substantial likelihood of irreparable misidentification." Griffin v. Delo, 33 F.3d 895, 908 (8th Cir. 1994).

In 1990, Heldebrand was shown a photo spread of six people, one of whom was Manning. She pointed to Manning as looking similar to the person who picked up the ransom money from her, but said the person she saw had lighter hair. She was then shown four individual pictures of people, including one of Manning. In this picture, Manning had lighter hair. Manning claims the government's method here was unduly suggestive because his picture was the only one common to both photo spreads.

Although Manning may be correct on this point, the photo spread nonetheless did not create "a substantial likelihood of irreparable misidentification." Id. In fact, Heldebrand was unable to identify Manning at her deposition, nor was she able to identify him at the first trial. It was not until the second trial that she identified Manning as the assailant. As such, Manning can hardly argue that the suggestive photo line-up forever etched his image as the assailant in Heldebrand's mind. Heldebrand's in-court identification at the second trial was the

more likely the product of her seeing Manning as the defendant time and again throughout these extended criminal proceedings. Manning is not entitled to relief on this ground.

IV. THE DELAY BETWEEN THE CRIME AND FORMAL CHARGES

Manning next claims that the delay between the time of the crime and the initiation of criminal proceedings against him was so long that he was deprived of due process. To prevail on a claim that delay in charging violated his due process, Manning must show that his defense has been substantially prejudiced by an unreasonable delay. Bennett v. Lockhart, 39 F.3d 848, 851 (8th Cir. 1994). To succeed on this claim, Manning must establish "actual prejudice," by identifying with specificity the evidence lost during the delay. Id. If Manning can show actual prejudice from the delay, the burden shifts to the state to show that the delay was not unreasonable. Id. A delay is not unreasonable if it is the result of a legitimate purpose, such as investigation. Id.

Manning was prejudiced by the delay. In the six and a half year delay between the crime and the filing of charges, three potential witnesses died. Two of these witnesses were also suspects in the kidnapping, while the third was a government informant. Certainly, Manning would have been better prepared had these witnesses been available for questioning. Most notably, Manning would have been apprised of the evidence against him, as well as the deficiencies in the state's witnesses. The presentation of Manning's case was hindered by not having these witnesses available.

Nonetheless, Manning is not entitled to relief on this claim. The delay between the crime and the charges was based on investigation. Following the crime, neither victim talked for several months. When they did, they were not able to identify

any assailants because both victims were blindfolded throughout the ordeal. There were no further breaks in the case until Mammolito gave a statement in 1989. Following Mammolito's statement, investigation continued, and charge were ultimately brought in July of 1990. Because delay based on further investigation is reasonable, no due process violation occurred.

CONCLUSION

Manning's due process rights were not violated by the lengthy precharging delay, nor by the government's pretrial identification procedures. However, the government's use of informants violated Manning's constitutional right to counsel and consequently, Sylvia Herrera's testimony should have been excluded at trial. Accordingly, we reverse the district court as to the right to counsel claim and remand with instructions to conditionally grant the writ, subject to the right of Missouri to retry Manning.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

STEVEN L. MANNING,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 97-0336-CV-W-3
	)	
MICHAEL BOWERSOX and	)	
JEREMIAH (JAY) NIXON,	)	
	)	
Respondents.	)	

ORDER DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

Pending is Petitioner's application for a Writ of Habeas Corpus, which consists of his original pro se Petition and his First and Second Amended Petitions. For the following reasons, the application for a Writ is denied.

I. BACKGROUND[1]

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[1]Petitioner was convicted of first degree murder and armed robbery in Illinois and sentenced to death. The convictions in this case were aggravating factors that lent support to the Illinois death sentence. This fact persuaded the undersigned to permit rather extensive discovery in this case because, although this was not a capital case, it had definite implications in the Illinois capital case. Subsequently, the Illinois Supreme Court vacated the conviction due to the admission of inadmissible evidence. People v. Manning, 695 N.E.2d 423 (Ill. 1998). After discovery in this case closed,

Petitioner's first trial ended in a mistrial in October 1991. Petitioner was convicted in January 1992 on two counts of kidnaping and two counts of armed criminal action. He was sentenced to two life terms for the kidnaping counts and two fifty year terms for the armed criminal action counts, with all sentences to run consecutively.

The crimes in question occurred in early 1984, and were prompted by Anthony Mammolito's discovery that Charles Ford was a drug dealer and had access to a lot of money. After viewing the evidence in the light most favorable to the guilty verdicts in the second trial, the Missouri Court of Appeals summarized the circumstances surrounding the crimes as follows:

> Mammolito went to Chicago to recruit individuals to help him kidnap Ford. Mammolito went to the house of a former fellow prison inmate, Thomas McKillip, and asked [for] McKillip's help in kidnapping Ford. McKillip made a telephone call. About 15 to 20 minutes later, Manning showed up at McKillip's house. After discussing the kidnapping plans, Manning recruited Gary Engel to help with the kidnapping. The next night, Manning, Engel, McKillip and Mammolito met at Engel's house and discussed the kidnapping. Mammolito then returned to Kansas City.
>
> A week or two later, McKillip drove to Kansas City and met with Mammolito. He told Mammolito that Manning and Engel would be flying from Chicago that night. McKillip

---

Illinois officials decided not to re-prosecute Petitioner.

showed Mammolito the paraphernalia that he had brought with him, including police radios for cars, hand-held radios, an assortment of badges from law enforcement agencies, search warrants, a red light, handcuffs, pistols, and a utility line repairer's belt. Later that night, Mammolito and McKillip picked up Manning and Engel at the Kansas City airport.

Mammolito, McKillip, Manning and Engel began following Ford. They followed him to the airport and watched him board a plane. They later learned that Ford's mother-in-law had died and that Ford was traveling to attend her funeral. Because nothing could be done until Ford returned, Manning and Engel went back to Chicago.

Manning and Engel returned to Kansas City a couple of days later. Mammolito and McKillip dropped Manning and Engel off in the Fairfax area of Kansas City, Kansas, for the purpose of stealing a car to use in the kidnapping. In the meantime, Mammolito and McKillip went to the house of Ford's sister, Carolyn Heldebrand, to plant a bugging device on Heldebrand's telephone. McKillip put on the utility line repairer's belt and a "Ma Bell" identification and climbed a telephone pole across the street. McKillip attached a bugging device to Heldebrand's telephone line. An FM radio could pick up the device's signal.

Later Mammolito, McKillip, Manning and Engel met at a "safe house." While there, they installed a red light, police radios, a police

scanner and an antenna to a car stolen by Manning and Engel. They then began watching Ford's apartment in Kansas City. Manning and Engel were in the stolen vehicle in one parking lot, and Mammolito and McKillip were in McKillip's car in another parking lot.

Ford and a friend, Mark Harris, arrived at the apartment at about 2:30 to 3:00 A.M. As they were getting out of Ford's truck, Manning and Engel ran up to them displaying badges and guns and yelling that they were DEA agents and that Ford and Harris were under arrest. Ford and Harris were told to face the truck and to put their hands on the truck as Manning and Engel searched them. They took a gun from Ford's pants. They handcuffed Ford and Harris and placed them in the back seat of the stolen car. They placed duct tape over Ford's and Harris' eyes.

* * *

The kidnappers allowed Ford to make some phone calls to raise money. They planned to pick up any money Ford could raise at Heldebrand's house. Heldebrand gathered $5000 and put it into a sack. Ford's friends went to Ford's apartment and picked up a briefcase full of money and dropped it off at Heldebrand's house.

Manning drove Ford's truck to Heldebrand's house to pick up the money. Heldebrand handed him a sack of money. When he returned to the safe house, Manning was

angry about the small amount of money in the sack, and he threatened to kill Ford and Harris. He hit Harris with a pipe. Ford called his sister and told her that she had forgotten the briefcase full of money. Manning went back to Heldebrand's house and picked up the briefcase.

In total, the kidnappers received about $30,000 to $50,000. They informed Ford that they would be back in about 30 days to collect the rest of the money. . . .

* * *

[Ford and Harris] did not immediately seek police help because of Ford's drug dealings and because they were concerned that the kidnappers would return in 30 days. Ford acknowledged the kidnapping to police in 1990, when he was negotiating a guilty plea to a drug charge.

In early 1984, a Southwestern Bell Telephone Company technician removed a bugging device from a telephone pole near Heldebrand's house. The Federal Bureau of Investigation found a similar device in Engel's apartment in Chicago in August 1990.

In February 1984, Lillian Schoenberger's car, a 1984 Chevrolet Caprice, was stolen from the Fairfax area of Kansas City, Kansas. Police found the car on July 12, 1984, at Kansas City International Airport. A key was jammed in the ignition, and a hole, which could have facilitated an antenna or similar device, had

been cut in the car's rear quarter panel.

In 1986, an FBI agent searched a storage locker belonging to Manning in Chicago. He found a paper with McKillip's name on it, two or three Illinois identification documents, a Minnesota driver's license, a Chicago police uniform badge, a Cook County Sheriff's Department badge, a document with Manning's picture and the name Steve Rosenbloom on it, assorted documents with other people's names on them, a document with Harris' name on it and descriptive information about him, a telephone bugging device, a police-type transmitter and receiver, and a portable antenna. Manning admitted that the items belonged to him.

Buffalo Grove, Illinois, police received a ring from Sharon Dugan, Engel's ex-wife. Dugan testified that she took Engel to the airport two times in 1984 so that he could travel to Kansas City. When she picked him up at the airport after his second trip to Kansas City, Manning was with Engel. Engel gave her a ring and told her that he had gotten it from a person they had kidnapped in Kansas City. Dugan turned the ring over to law enforcement officers. Ford identified the ring as the one taken from him during the kidnapping. Dugan also testified that she overheard Engel and McKillip talking about going to Kansas City and acting as DEA agents to rip off drug dealers.

In June 1990, Heldebrand identified Manning in a photograph lineup as the man who

> picked up the ransom money. She also identified Manning at trial. Heldebrand, however, was unable to identify [Manning] at a deposition at which she was present or at the first trial.
>
> Sylvia Herrera testified at trial that she knew Manning through her boyfriend, Tommy Dye, who asked her in late 1990 to help provide Manning an alibi for certain dates in February 1984. Herrera saw Manning in jail, spoke to him on the telephone, and received letters from Manning. Herrera went to a library and got copies of the *Sun Times* newspaper for Manning so that he could review what movies and events occurred during the period in question. Manning asked Herrera for information about her family. He instructed her to say that Manning was with her family during the days in which the kidnapping occurred and that they went to movies and did other things together. Manning told Herrera that she and her family would be paid thousands of dollars for providing him with an alibi.

State v. Manning, WD 46206 slip op. at 3-7 (Mo. Ct. App. Aug. 23, 1994). Additional facts will be presented as necessary in the context of the legal issues raised by Petitioner.

II. DISCUSSION

Petitioner filed a pro se application for a Writ of Habeas Corpus on March 26, 1997. Counsel was appointed, and on October 15, 1997 a First Amended Petition for Writ of Habeas Corpus was filed. The parties have treated the claims raised in these petitions as supplemental; that is, the First Amended

Petition did not replace the pro se petition. Then, on March 24, 1998, a Second Amended Petition was filed that added an additional claim to those asserted in the First Amended Petition. As have the parties, the Court will separately consider all claims raised in these documents. The Court will begin with the arguments presented by counsel and then consider the arguments Petitioner has presented on his own behalf.

As an initial matter, the Court must consider whether the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this case. The provisions of AEDPA apply to all habeas petitions filed after its effective date in April 1996. Lindh v. Murphy, 521 U.S. 320, 326 (1997). This represents Petitioner's second effort to obtain a writ; the first effort was filed and dismissed without prejudice before AEDPA became effective. The instant case was filed after AEDPA's effective date. Petitioner argues that this case is merely a continuation of his first case because the first case was dismissed without prejudice, so pre-AEDPA standards should apply. The Eighth Circuit recently rejected this argument, Weaver v. Bowersox, 241 F.3d 1024, 1029 (8th Cir. 2001), and on that basis this Court holds that AEDPA governs this case.

AEDPA amended 28 U.S.C. §2254 by, *inter alia*, changing the provisions governing the standard of review. Generally speaking, section 2254 previously provided for deference to factual findings made by state courts and for *de novo* review of state courts' conclusions of law. Following AEDPA, the operative portions of section 2254 state as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under subsection (d)(1), this Court's role in reviewing factual determinations is virtually the same as it was under prior law. With respect to the review of legal issues under subsection (d)(2), a decision is not "contrary to" federal law if the state court identifies and applies controlling Supreme Court precedent, even if the federal court would have reached a different result after applying that precedent. Evans v. Rogerson, 223 F.3d 869, 872 (8th Cir. 2000). Thus, a state court decision is "contrary to" Supreme Court precedent if the court applies a rule that contradicts the governing law or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from . . . precedent." Williams v. Taylor, 120 S.Ct. 1495, 1519-20 (2000). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable . . . . [T]he most important point is that an unreasonable application of federal law is different from an incorrect application of law." Id. at 1521-22. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 1523.

A. Speedy Trial and Related Due Process Concerns

Petitioner alleges that the passage of time between the date the crime was committed and the date he was first formally charged with the crime violated his right to a speedy trial and/or his rights guaranteed under the Due Process Clause. Respondent contends that this claim was procedurally defaulted when it was not presented on appeal. Petitioner rejoins by arguing that the default should be excused because (1) he is actually innocent, and (alternatively) (2) appellate counsel was ineffective in failing to pursue the claim on appeal. Rather than delve into the complicated issues surrounding these arguments at this juncture, the Court will address the relatively simpler matter of the merits and rule against Petitioner on this point. Cf. Stephens v. Norris, 83 F.3d 223, 224 (8th Cir. 1996) (Court of Appeals can reject claim on merits without delving into the "potential procedural-bar morass"); McKinnon v. Lockhart, 921 F.2d 830, 833 n.7 (1991) (suggesting that "it might well be easier and more efficient to reach the merits than to go through the studied process required by the procedural default doctrine" because the District Court "could likely have disposed of the merits . . . with little effort.").

First, the Sixth Amendment has no bearing on this issue because Petitioner alleges preindictment, not postindictment, delay. United States v. Lovasco, 431 U.S. 783, 788 (1977); United States v. Edwards, 159 F.3d 1117, 1128 (8th Cir. 1998), cert. denied, 528 U.S. 825 (1999). Petitioner's claims must be evaluated under the dictates of the Due Process Clause.

> To prevail in this circuit on a claim of violation of due process on account of delay in charging a suspect, the aggrieved person must prove that the delay was unreasonable and that it actually and substantially prejudiced the presentation of the defense. Under this standard, a showing of actual prejudice must first be established; if it is, the court will then inquire into the reasons for

> the delay and balance those reasons against the demonstrated prejudice.

Bennett v. Lockhart, 39 F.3d 848, 851 (8th Cir. 1994), cert. denied, 514 U.S. 1018 (1995) (quotation omitted). The Court concludes that Petitioner cannot satisfy either component of this analysis.

> To prove actual prejudice, the aggrieved person must specifically identify witnesses or documents lost during delay properly attributable to the government. The aggrieved person also must relate the substance of the testimony which would be offered by the missing witnesses or the information contained in lost documents in sufficient detail to permit a court to assess accurately whether the information is material to the accused's defense. Finally, the aggrieved person must show that the missing testimony or information is not available through substitute sources. In sum, the aggrieved person must demonstrate that the prejudice actually impaired his ability to meaningfully present a defense

Id. Petitioner alleges that he was prejudiced because (1) difficulty in determining the precise date of the kidnaping prevented him from presenting an alibi witness, (2) McKillip, the person who provided the safe house, a person Petitioner theorizes was involved in the crime (Joe Shahan), and an unnamed alibi witness all died before the case was tried, and (3) witnesses forgot details, resulting in contradictions throughout the state's case. This showing falls far short of the standard required to demonstrate prejudice. Petitioner has not presented evidence from any alibi witnesses, nor has he identified the deceased alibi witness. He also has not demonstrated that the

deceased alibi witnesses' information was not available from other sources, which is particularly telling given that this alibi places him in an entirely different state. The person who provided the safe house never dealt with anyone other than Mammolito, so this person's death did not prejudice Petitioner's case. The impact of Shahan's and McKillip's deaths is purely speculative. Finally, discrepancies in testimony and forgotten details do not qualify as prejudice.

"If actual and substantial prejudice has been demonstrated, the government may be required to show that the delay was for investigative purposes or some other legitimate reason . . . . Absent a showing that the government acted intentionally to harass or to gain a tactical advantage, no due process violation may be found." United States v. Benshop, 138 F.3d 1229, 1232-33 (8th Cir. 1998). Petitioner emphasizes Ford's and Harris' testimony that they separately reported the kidnaping in 1984 or 1985. E.g., Tr. at 249 (Harris), at 282-85 (Ford). However, all they could report was the fact that they had been kidnaped; the victims thought they were being arrested and took no particular notice of the kidnapers, and the first time they realized they were being kidnaped was when duct tape was placed over their eyes -- by which time it was impossible to take note of their abductors. Tr. at 209, 215, 272. It was not possible to search for physical evidence because neither victim knew where they had been taken. Showing Ford and Harris pictures of possible suspects was impossible because there were no suspects. Law enforcement did not receive any information about the perpetrators until Mammolito discussed the matter in August 1989. Tr. at 381. Ford, Harris and Dugan were interviewed within five months. Tr. at 436-37. Heldebrand was interviewed in June 1990, at which time she was shown several photo arrays. Tr. at 471, 504-05. It was not until Mammolito discussed the crime that other seemingly unrelated matters could be connected to the crime, such as the theft of the car from Kansas and the discovery of the bugging device on

Heldebrand's phone. Petitioner was charged on a four-count criminal complaint in July 1990. Ultimately, there is no indication that any level of law enforcement acted intentionally in delaying the prosecution of this matter for the purposes of harassing or prejudicing Petitioner.

B. False and Perjured Testimony

Petitioner contends that newly discovered evidence demonstrates both that Mammolito lied at trial and that the prosecution was aware of this fact. Respondent contends that this issue was procedurally defaulted, and Petitioner argues to the contrary; as with the preceding issue, it is more expedient to address the merits.

Some of the examples of perjury do not qualify as "newly discovered;" Petitioner has compared Mammolito's statements (1) during interviews with law enforcement officers, (2) at the preliminary hearing, and/or (3) at the first trial to his testimony at the second trial and identified eight areas of inconsistency. These inconsistencies relate to the following questions:

1. When did Mammolito go to Chicago to meet McKillip?

2. Who was present at the meeting at Engel's house?

3. Where was the safe house?

4. Did they or did they not go by the safe house on the second day the Chicagoans were in Kansas City?

5. Who did Ford call to raise the ransom money?

6. Did Mammolito ever go in the hotel room he rented for

Petitioner and Engel?

7. When was the car stolen from Kansas, and what color was it?

8. Did Mammolito have a deal with the prosecutor's office regarding his testimony?

To prevail on this claim, Petitioner must demonstrate "that: (1) the prosecution used perjured testimony; (2) the prosecution knew or should have known of the perjury; and (3) there is a 'reasonable likelihood' that the perjured testimony could have affected the jury's judgment." United States v. Martin, 59 F.3d 757, 770 (8th Cir. 1995). It must be remembered that not every inconsistency qualifies as perjury, and some contradictions are insufficiently material to justify labeling them as perjury. Id.

Initially, the Court notes that Mammolito was subjected to a very vigorous cross-examination that highlighted the discrepancies in his testimony. The jury was fully aware of Mammolito's prior statements, and nonetheless chose to believe him. This is not a case where the truth was buried by the prosecution and hidden from the jury, rather, it a case in which the jury was called upon to perform its primary function: i.e., credibility assessment. In making this assessment, the jury was required to compare Mammolito's testimony to that offered by other witnesses and decide how much (if any) of his testimony should be credited. To the extent that the jury was aware of Mammolito's prior inconsistent statements, no misconduct occurred.

The Court further observes that several of these matters are too insignificant to qualify as perjury or to have any effect on the jury. For instance, it matters little whether Mammolito went into the hotel room. Although there were discrepancies regarding the order in which Ford called people to raise the

ransom money, there was basic agreement as to who was called. These are but two examples; the Court does not believe that Items 4 - 7 identified by Petitioner are terribly significant matters.

The seventh item stands alone in that it is supported with additional information that was not presented at trial. Petitioner contends that Mammolito received special treatment from the guards at the Platte County Jail while held there[2] and that he was provided with copies of "transcripts and other various documents in order for him to get his story together for the retrial." First Amended Petition at 27. The "special treatment" took the form of special smoking accommodations and the provision of food from a local barbecue restaurant. The record does not reflect how often these privileges were bestowed, and in the case of the smoking privileges this may be a simple reference to the fact that he was transferred from the Clay County Jail (where smoking was not allowed) to the Platte County Jail (where smoking was allowed). See Gipson Affidavit, ¶7. With respect to anything more that may have been done for Mammolito while in jail during the trial, there is no indication that the *Clay County* prosecutor knew what the *Platte County* jailors were doing. Petitioner also relies on Mammolito's letters indicating his expectation -- and referencing an alleged agreement -- that he would be paid $25 a week while he was in Platte County. Petitioner has not established the existence of such a deal, nor has he demonstrated that anyone other than Mammolito believes it to have existed.

In a letter dated February 7, 1992 and addressed to

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[2]Mammolito was serving a federal sentence but was temporarily held in the Platte County Jail during these proceedings.

Robert Quid, a Sergeant on the Buffalo Grove (Illinois) police force, Mammolito wrote the following: "As you know ive [sic] read all of the investigation's reports on this case and i [sic] must say that im [sic] quite impressed at the way you put this case together on my slim statement given in August of 1989 . . . ." Petitioner also points to an affidavit from Harold Bascom - who was also held in the Platte County Jail while Mammolito was there - averring that he saw Mammolito with copies of transcripts "as well as statements and police reports" and that Mammolito said the Clay County Prosecutor's office supplied them so he could address the "'gaping inconsistencies' of his already incredible story." Mammolito also allegedly told Bascom that after the mistrial, he was warned that "all deals were off" (whatever deals those might have been) if his testimony was not better at the second trial. Finally, Bascom describes statements by Mammolito indicating that he was setting up Manning in the hopes of leniency. Petitioner characterizes this as newly discovered evidence demonstrating that Mammolito lied.[3]

Petitioner does not suggest that the prosecutor knew about the statements allegedly made by Mammolito to Bascom, so the second requirement under Martin is absent. Moreover, careful review of Bascom's affidavit reveals that Mammolito allegedly was trying to curry favor with the government and was seeking some measure of revenge against Petitioner, but there is little if anything to indicate that Mammolito admitted to Bascom that his testimony was a lie. It should also be noted that during cross-examination Mammolito admitted his dislike for Petitioner, Tr. at 393-94, and the possibility of leniency was

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[3]In the context of this argument, Petitioner does not offer a "free standing" claim of actual innocence; that is, he does not allege here that he is entitled to a Writ of Habeas Corpus because he is actually innocent.

also addressed. Tr. 389-91.

The Court rejects Petitioner's suggestion that the prosecutor provided Mammolito with trial and investigative materials so that he could "get his story straight" for two reasons. First, this act was allegedly accompanied by a threat that the "deal" would be "off," but there was no deal. Second, if the alleged purpose was to allow Mammolito to conform his testimony to that of other witnesses or to his own prior statement, the effort - as amply documented during cross-examination - failed. Petitioner's argument might make more sense if Mammolito "suddenly" testified in a manner that was completely consistent with Ford's, Harris', or Heldebrand's testimony. That this did not occur demonstrates Petitioner's argument is flawed. Finally, the Court reiterates its earlier observation that Mammolito was subjected to a rather lengthy cross-examination during which nearly every discrepancy was brought to the jury's attention, and Petitioner's arguments do not demonstrate that these inconsistencies amounted to the knowing use of perjury that had an effect on the jury.[4]

C. Heldebrand's Identification

During trial, counsel made no objection to Heldebrand's in-court identification or to the photographic array she was shown in June 1990. Counsel's failure to object and/or move to suppress these identifications was raised in the postconviction proceeding and on appeal. In the context of this argument, Petitioner primarily argues the merits of the identification claim as opposed to the alleged ineffective assistance for failing to

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[4]In his Traverse, Petitioner makes a reference to Brady v. Maryland, 373 U.S. 83 (1963), but an argument predicated on Brady was not advanced in the Pro Se Petition, the First Amended Petition, or the Second Amended Petition.

raise the issue. Respondent argues that the claim has been procedurally defaulted, and Petitioner rejoins by claiming, *inter alia*, that the Missouri Court of Appeals addressed the merits of the identification claims, thereby vitiating any default.

The Court does not agree with Petitioner's characterization. The Missouri Court of Appeals addressed certain aspects of the merits of the identification arguments, but only in the context of determining whether or not the alleged ineffectiveness prejudiced Petitioner as required under Strickland v. Washington. Nonetheless, given both the extent to which the underlying claim is intertwined with the question of ineffective assistance and the relatively easier task of considering the merits, the Court will not dwell on the issue of procedural default.

There are two aspects to this claim. The first involves Petitioner's claim that the photographic array shown to Heldebrand in June 1990 was unduly suggestive.

> The analysis for challenging an improper identification mandates two separate findings. First, a court must determine whether the challenged confrontation between the witness and suspect was impermissibly suggestive. If so, then the court must decide whether, under the totality of the circumstances, the suggestive confrontation created a substantial likelihood of irreparable misidentification. Second, a court must ascertain whether the identification procedure was so needlessly suggestive and conducive to mistaken identification as to be fundamentally unfair.

Griffin v. Delo, 33 F.3d 895, 908-09 (8th Cir. 1994), cert. denied, 514 U.S. 1119 (1995) (internal citations omitted). In

the First Amended 29.15 Motion, Petitioner argued that the array was suggestive because he was depicted in two different pictures. In this proceeding, he contends the array was suggestive but in doing so does not address the contents of the array itself, but rather challenges (1) Heldebrand's certainty in identifying Petitioner, (2) inconsistencies between Heldebrand's description and Petitioner, and (3) the law enforcement officer's motivation of putting Petitioner's photos in the array and not including McKillip's or Mammolito's. First Amended Petition at 33-34. These arguments do not bear on the initial issue of suggestiveness but rather relate to the intermediate issue of whether there was a substantial likelihood of misidentification. See id. at 909 (listing "the factors a court is to consider in evaluating the likelihood of misidentification"). This intermediate issue is to be addressed only if there is first a finding of unfair suggestiveness, but Petitioner does not provide any basis for making such a finding. In any event, the Court concludes that the array was not suggestive for the reasons intimated in the state court proceedings; the fact that a suspect is included twice in an array does not demonstrate suggestiveness, particularly when (as is the case here) the photos of the suspect are different. E.g., Armstrong v. Gammon, 195 F.3d 441, 445 (8th Cir. 1999), cert. denied, 529 U.S. 1092 (2000). Petitioner's argument regarding Heldebrand's pretrial identification represent grounds for impeachment, but not constitutional infirmities.

Petitioner's arguments about Heldebrand's in-court identification appear virtually the same as those advanced with respect to her pretrial identification. The legal analysis is also practically the same. "We follow a two-step analysis in reviewing the . . . . admission of these in-court identifications. First, we must determine whether the initial confrontation between the suspect and the witness was impermissibly suggestive; if so, we must then determine whether, under the totality of the circumstances, the suggestive procedure created

a very substantial likelihood of irreparable misidentification." United States v. Patterson, 20 F.3d 801, 805-06 (8th Cir.), cert. denied, 513 U.S. 845 (1994) (quotation omitted). As before, there is no basis for concluding that the initial identification was the product of a suggestive procedure, so there is no need to conduct further inquiry into the matter.

D. Sylvia Herrera's Testimony

Petitioner contends that Herrera's testimony about Petitioner soliciting her help to fabricate an alibi should have been suppressed because it was the product of a Sixth Amendment violation, and counsel's failure to object constituted ineffective assistance of counsel. The Court again elects to bypass the various arguments favoring and opposing the existence of a procedural default, preferring instead to address the merits.

While awaiting extradition from Illinois to Missouri on these charges, Petitioner and Tommy Dye were cellmates. The record reflects that Dye reported to the FBI statements made by Manning, and that Dye was instructed not to initiate conversations with Manning regarding the kidnaping and related charges. Dye signed a document confirming his understanding that he was not to "ask Steve Manning about his current pending charges, which include the proceedings involving extradition to Missouri and/or the underlying Missouri kidnapping charges nor am I to ask anything which may relate to legitimate defense strategy concerning the pending charges." Petitioner's Exhibit N. However, he was told it was acceptable for him to "discuss other crimes with Manning, including any involvement that Manning had in the murder of James Pellegrino and any other murders." Id. Dye was later wired with a body microphone and recorder, but the record does not reflect the content of any of his conversations with Manning.

Petitioner argues that United States v. Henry, 447 U.S. 264 (1980) and Maine v. Mouton, 474 U.S. 159 (1985) control and clearly establish that instructing a jailhouse informant to listen to and report statements made by a cellmate regarding pending charges violates the Sixth Amendment right to counsel. However, the more applicable case is Kuhlmann v. Wilson, 477 U.S. 436 (1986). There, the Supreme Court observed that Henry "left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was placed in close proximity but made no effort to stimulate conversations about the crime charged," 477 U.S. at 456 (quotation omitted), and that Mouton focused on "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." Id. at 459. The Court went on to hold that "a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." Id; see also Robinson v. Clarke, 939 F.2d 573, 576 (8th Cir. 1991).

It is true that Dye was told he could discuss other specified crimes, but this was merely a part of the larger instruction that he not initiate discussions about the kidnaping. Even if questions about the murders were asked -- and were improper -- they would not render information Manning volunteered about these crimes inadmissible under the Sixth Amendment. The Supreme Court recently reaffirmed that the Sixth Amendment right to counsel is offense-specific. Texas v. Cobb, No. 99-1702, slip op. at 2 (U.S. Apr. 2, 2001). In this context the term "offense" may be broader than that described in the charging document, id. at 7 (applying standard from Blockburger v. United States, 284 U.S. 299 (1932) for this purpose), but there is no contention that the instant crimes are

related to the murders described in Petitioner's Exhibit N. It may be that Manning's statements about the murders (if there were any) were inadmissible in a trial on those crimes, but that has no effect on the admissibility of statements Manning volunteered about unrelated offenses. Ultimately, the record does not reflect that Dye initiated discussions about these crimes, so the mere fact that he had received instruction from the FBI does not demonstrate that his activities violated Petitioner's Sixth Amendment rights.

E. Ineffective Assistance of Trial Counsel: Failure to Present Certain Witnesses

The First Amended Petition incorporates and augments the pro se Petition's presentation of this issue. The contention is that trial counsel should have called the following witnesses to provide an alibi for Petitioner: Gustav Guenther, Marlies Vukelich, Corine (Cory) Robin, and Officer Bruce Vaccaro.[5]

A claim of ineffective assistance of counsel is analyzed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). "This standard requires [Petitioner] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.'" Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995), cert. denied, 517 U.S.

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[5]Interestingly, before the defense rested Petitioner answered affirmatively when the trial judge asked "whether you're satisfied that whoever you have asked [trial counsel] to call on your behalf has in fact [been] called or [he] followed your instructions in that regard." Tr. at 596. He also denied that "there was in that connection the calling of the witnesses . . . . been any refusal . . . to subpoena or call someone on your behalf." Tr. at 596-97.

1214 (1995) (quoting Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," Strickland, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second guessing of trial counsel's strategic decisions. Id. at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different.'" Lawrence, 961 F.2d at 115 (quoting Strickland, 466 U.S. at 694).

Id. Failure to satisfy both prongs is fatal to the claim, see Pryor v. Norris, 103 F.3d 710, 713 (8th Cir. 1997) (no need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness").

On appeal, Petitioner challenged only the failure to call Robin as a witness.[6] In rejecting this claim, the Missouri Court

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[6]Although there is some question as to whether Petitioner was required to seek transfer to the Missouri Supreme Court in order to avoid defaulting his claims, there is little doubt that failure to raise claims regarding the other witnesses in the first appeal of right constitutes a procedural default. However, the state has not raised this issue, and the law is

of Appeals found that trial counsel "did not call Robin during the second trial because she had told his investigator that her husband was secretly held by the government and drugged to learn secrets about the Russian Government. [Petitioner's] attorney stated that he had serious concerns at that point about Robin's ability to recall and relate information." Manning, slip op. at 12. This finding is supported by the record, and the conclusion that the decision not to call Robin was reasonable trial strategy is not an unreasonable application of Strickland. One of a trial attorney's many tasks is to evaluate the benefits and risks of a potential witness' testimony, and the decision not to call Robin was a legitimate result of that process.

The Rule 29.15 court concluded that trial counsel decided not to call Vukelich "because he learned from her that she had received written instructions on how to testify or what to say. [Trial counsel] indicated he did not want to put her on the witness stand because of a fear the letter may be discovered and substantially undermine the defense. [In light of Herrera's testimony], if Vukelich testified and the letter was discovered,

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presently unclear as to whether the Court can raise the issue of procedural default *sua sponte*. Trest v. Cain, 522 U.S. 87, 90-91 (1997). Were it clearly permissible to do so, the Court would hold these aspects of this claim to be procedurally defaulted.

Respondent argues that the failure to seek transfer to the Missouri Supreme Court constitutes a procedural default. The Court is not convinced that this is correct, and notes that the issue is currently pending before the Eighth Circuit. Consistent with its approach on other issues in this case, the Court deems it more expedient to reject the claim on its merits rather than determining whether it has been defaulted for failure to seek transfer.

[trial counsel] believed it would strongly corroborate the State's case concerning the establishment of a fabricated alibi by Movant and would seriously undermine the defense." Postconviction Legal File at 71. This is also a reasonable application of Strickland.

With respect to the remaining two witnesses, the motion court declared that "[n]o evidence, other than the assertion of Movant, was presented that either Guenthner nor [sic]Varacco [sic] were available to testify at the second trial." Postconviction Legal File at 71. Absent a showing that the witness was available for trial, Petitioner's claim cannot succeed. See Owens v. Dormire, 198 F.3d 679, 682 (8th Cir. 1999), cert. denied, 120 S.Ct. 2725 (2000).[7] There is also nothing to demonstrate the content of these witness' testimony. Consequently, the state court's decision on this issue is reasonable and entitled to deference.

Within this claim, Petitioner also challenges trial counsel's failure to call him to the stand. The motion court observed that Petitioner told of his right not to testify during the trial. Postconviction Legal File at 71. The trial transcript

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[7]In fact, Vaccaro was advised by his attorney not to appear at the Rule 29.15 Hearing or to provide a deposition for use at the proceeding. See Postconviction Transcript at 77-79. Petitioner contended Vaccaro was threatened by FBI Agent Robert Buchan, but offers no support for that contention. He has pointed to portions of the transcript indicating that Bobby Sue May, Margaret Pettiford and Bobby Lee Pettiford were approach by Buchanan, who warned them about Petitioner's dangerousness. None of these people were potential witnesses, and it is a stretch to conclude that just because Agent Buchan talked to non-witnesses he must have also talked to potential or actual witnesses.

confirms the accuracy of this holding. In addition, the Missouri Court of Appeals affirmed the motion court on this point, disagreeing with Petitioner's contention that he desired to and was ready to testify but was refused the opportunity. Manning, slip op. at 10-11. This holding is entitled to deference because it is supported by the record. Petitioner was aware of his right to testify and chose not to do so; moreover, he told the judge that there were no other witnesses he wanted called on his behalf. Tr. at 595-97. This claim must be denied.

F. Ineffective Assistant of Trial Counsel: Failure to Show FBI's Motive to Target Petitioner

Respondent correctly contends this claim was procedurally defaulted when it was not raised on appeal. Petitioner argues that the procedural default is excused for two independent reasons: (1) ineffective assistance of appellate counsel for failing to raise the issue on appeal and (2) he is actually innocent. The Court rejects both contentions, and alternatively holds that the claim lacks merit.

1. Ineffective Assistant of Appellate Counsel

Petitioner's postconviction proceeding was governed by Missouri Rule of Criminal Procedure 29.15, which at the time[8] was "a complicated, hybrid scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of post-conviction relief." Lowe-Bey v. Groose, 28 F.3d 816, 818 (8th Cir.), cert. denied, 513 U.S. 1061 (1994). "Following the filing of a Rule 29.15 motion, the defendant litigates his or her Rule 29.15 claims through the sentencing

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[8]Rule 29.15 was amended effective July 1, 1997; the amended version does not apply to Petitioner. Rule 29.15(m).

court while the direct appeal is held in abeyance. If the sentencing court denies Rule 29.15 relief, a separate notice of appeal must be filed in the sentencing court if the defendant desires to appeal issues raised in the 29.15 motion." Id. at 819. The two appeals are consolidated into a single "hybrid" appeal, but "Rule 29.15 contemplates that the direct appeal and the 29.15 appeal retain their independent identity even though consolidated." Id.

A consequence of the separate appeals retaining their individual character is that the obligation to pursue an appeal from the 29.15 ruling rests with postconviction counsel, not appellate counsel. "No Missouri rule of appellate procedure or criminal procedure relieves post-conviction relief counsel of his or her duties before the time arrives for filing the notice of appeal challenging the denial of Rule 29.15 relief." Id. This is true even though the same attorney is performing a dual role: appealing issues in the direct appeal *and* appealing issues raised in the 29.15 proceeding. Petitioner is not entitled to effective assistance of counsel in a post-conviction proceeding, Coleman v. Thompson, 501 U.S. 722 (1991), and therefore is not entitled to effective assistance of counsel in an appeal from the post-conviction proceeding. Lowe-Bey, 28 F.3d at 819-20. Thus, when the appellate counsel is performing his function of appealing issues from the 29.15 proceeding, there is no Sixth Amendment protection; the Sixth Amendment only applies to the attorney's performance with respect to issues arising from the direct appeal. There can be no claim of ineffective assistance in the appeal of issues raised in the 29.15 proceeding, so the argument does not present a basis for excusing the procedural bar.

2. Actual Innocence

"To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the

'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." Schlup v. Delo, 513 U.S. 298, 321 (1995).

> [A] petitioner who raises a gateway claim of actual innocence must satisfy a two-part test. First, the petitioner's allegations of constitutional error must be supported with new reliable evidence that was not presented at trial. Second, the petitioner must establish that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The actual innocence exception requires review of procedurally barred, abusive, or successive claims only in the narrowest type of case -- when a fundamental miscarriage of justice would otherwise result.

Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir.) (en banc), cert. denied, 522 U.S. 1093 (1997).

A petitioner asserting a Schlup "gateway" claim must support his allegations with reliable evidence. Schlup, 513 U.S. at 324; McCoy v. Norris, 125 F.3d 1186, 1190 (8th Cir. 1997), cert. denied, 523 U.S. 1008 (1998); Battle v. Delo, 64 F.3d 347, 354 (8th Cir. 1995), cert. denied, 517 U.S. 1235 (1996). The emphasis is on *evidence* - not merely allegations or speculations - to prove his point. Weeks, 119 F.3d at 1352-53. The evidence must demonstrate factual innocence of the crime; evidence bearing on the allegedly improper application of criminal law will not suffice. Embrey v. Hershberger, 131 F.3d 739, 741 (8th Cir. 1997) (en banc), cert. denied, 525 U.S. 828 (1998); Pitts v. Norris, 85 F.3d 348, 350-51 (8th Cir.), cert. denied, 519 U.S. 972 (1996). Examples of the proper type of

evidence include "exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence . . . ." Schlup, 513 U.S. at 324. In addition, "an important initial step in the analysis of a habeas petitioner's claim of actual innocence" is whether the proffered evidence is new. McCoy, 125 F.3d at 1190; see also Schlup, 513 U.S. at 324. Evidence that is merely cumulative of evidence already offered at trial will not satisfy the standard. McCoy 125 F.3d at 1191. Furthermore, evidence that was known to or readily available to the criminal defendant will not satisfy the Schlup standard. E.g., Schlup, 513 U.S. at 327-28 ("the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either *excluded or unavailable at trial*. (emphasis added)); Bannister v. Delo, 100 F.3d 610, 618 & n.7 (8th Cir. 1996), cert. denied, 521 U.S. 1126 (1997); see also Lucas v. Johnson, 132 F.3d 1069, 1082 n.3 (5th Cir. 1998).

"In deciding whether a petitioner has made the necessary showing of innocence, a federal court must make its own determination of whether the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial is sufficient to warrant consideration of the otherwise barred claims. . . . If a petitioner presents evidence of his actual innocence so strong that a court cannot have confidence in the outcome of his state trial, it should not allow his execution unless it is also satisfied that his trial was free of nonharmless constitutional error." Amrine, 128 F.3d at 1227 (quotation omitted). This inquiry may require the Court to make credibility decisions about the witnesses involved. Id. at 1228.

In considering Petitioner's claim, the Court considers the facts outlined by the Missouri Court of Appeals as well as the following additional facts gleaned from the transcript but not specifically cited by that court. First, Agent Robert Buchan interviewed Heldebrand and showed her the photographs in

June 1990. He testified that Heldebrand identified the first picture of Manning "with some degree of certainty," declaring that it "looked very similar but he had lighter hair." Tr. at 508. Second, the funeral for Ford's mother-in-law was on February 9, 1984, Tr. at 434, and bank records confirmed that Heldebrand withdrew a large sum of money on February 10, 1984. Tr. at 499, 502-03. Finally, the Court also observes a great many facts that corroborate the verdict, including (1) Dugan's observation that Engel and Petitioner returned to Chicago on the same flight from Kansas City and (2) Petitioner's acknowledged possession of papers bearing personal information about Harris.

In support of his "gateway" claim of actual innocence, Petitioner relies heavily upon the inconsistencies in the various witnesses' testimonies. This is not new evidence within the meaning of Schlup. He also offers various forms of additional impeachment, but this will not satisfy Schlup because (1) none of it is reliable, nor does it persuade the Court that Petitioner is probably innocent, and - more importantly - (2) impeachment evidence does not satisfy Schlup. E.g., Morris v. Dormire, 217 F.3d 556, 559 (8th Cir.), cert. denied, 121 S.Ct. 439 (2000) (evidence that only impeaches a witness does not satisfy Schlup); Johnson v. Norris, 170 F.3d 816, 818 (8th Cir. 1999) (evidence that is not exculpatory does not establish actual innocence). The Court concludes that Petitioner has not demonstrated actual innocence, so the manifest injustice exception to the procedural default does not apply.

3. The Merits

Even if the procedural default could be excused, this claim must fail on the merits. At the 29.15 hearing, Petitioner's trial counsel explained that the problem with such a defense is that it risked "opening up a series of doors into a trial that we thought that we might be able to keep into a very small

spectrum." Postconviction Transcript at 39. He further explained that he did not think it would be in Petitioner's best interests to present this theory.

The motion court held that this defense "would not have been helpful" and declining to employ it was "valid trial strategy." Postconviction Legal File at 80. The Court agrees; trial counsel could legitimately conclude that more harm than good would be done if the jury heard that Petitioner filed suit alleging governmental misconduct while he was in jail on other charges and that Petitioner had been arrested and charged on multiple prior occasions.

G. Prosecutorial Misconduct During Closing Argument

Petitioner contends the prosecutor made improper statements during closing argument when he (1) referred to Petitioner as a "professional criminal," (2) told the jury to "send a message" to Petitioner that "Clay County doesn't like crime." Trial counsel did not object to the first statement; he objected to the second statement (which is actually reflective of a serious of arguments) on the ground that "the laws in Clay County are not different than any place else in the country." Petitioner challenged the second series of statements on appeal, characterizing them as scare tactics. The Missouri Court of Appeals concluded that this argument was different than the one raised in the objection during trial and reviewed the claim for plain error.

Respondent contends this claim is procedurally defaulted. Petitioner responds by pointing to the Court of Appeals' discussion of the point. It is true that a procedural default is vitiated if the state courts reach the merits, but this will not salvage Petitioner's claims regarding the "professional criminal" comments. This claim has never been raised or addressed in state court, and for that reason it has been

defaulted.

There is a split of circuit authority as to whether plain error review by a state court removes the procedural bar. However, when the state court conducts a plain error review, it is appropriate for the habeas court to conduct a similar review. Burns v. Gammon, 173 F.3d 1089, 1095 (8th Cir. 1999). Under this standard, Petitioner must demonstrate that the prosecutor's statements violated his Due Process rights, and then must demonstrate plain error; i.e., manifest injustice flowing from that violation.

"The test for prosecutorial misconduct has two parts. First, the remarks must have been improper, and second, the remarks must have been so prejudicial as to deprive the defendant of a fair trial." Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998), cert. denied, 528 U.S. 880 (1999). Needless to say, if the remarks were not improper, there is no unfair prejudice to be gauged and the second component of the analysis is unnecessary. However, in the event an improper comment is revealed, it must be remembered that the standard of prejudice is relatively high. "The petitioner must show that the alleged improprieties were 'so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair." Moore v. Wyrick, 760 F.2d 884, 886 (8th Cir. 1985). Under this standard, a petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial--i.e., that absent the alleged impropriety, the verdict probably would have been different." Newlon v. Armontrout, 885 F.2d 1328, 1336-37 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990) (second quotation omitted); see also Darden v. Wainwright, 477 U.S. 168, 181 (1986). In evaluating the potential for prejudice, the Court must consider "(1) the type of prejudice that arose from the remark; (2) whether defense counsel did anything in his argument to minimize the prejudice; (3) whether the jury was properly

instructed; and (4) whether there is a reasonable probability that the outcome of the [proceeding] would have been different. . . ." Young, 161 F.3d at 1162. With regard to the third element, the fact that the jury was generally instructed that arguments of counsel are not evidence is insufficient to thwart a showing of prejudice. E.g., Antwine v. Delo, 54 F.3d 1357, 1364 (8th Cir. 1995), cert. denied, 516 U.S. 1067 (1996); Newlon, 885 F.2d at 1337. Then, because the claim was defaulted and reviewed for plain error, Petitioner must not only demonstrate the prejudice described above, but must also demonstrate manifest injustice resulting from that prejudice.

The full text of the challenged portion of the argument (which occurred during rebuttal) is set forth below:

> Find the defendant guilty. He came down from Chicago and committed an offense not just against Charlie Ford and Mark Harris, but against Clay County. And yes Mammolito's got convictions but Mammolito testified it's Manning that's the professional. . . . Tell him Clay County doesn't like crime. Justice has to be even-handed. When the evidence is presented we don't shirk from our responsibility. Proof beyond a reasonable doubt will convict. You don't send the defendant a message that you like drugs, that you like Charlie Ford, that you like Mark Harris; you send him a message that you do crime in in Clay County, you're going to be held accountable. We don't like crime. By your message convict him on all four counts.

During his closing argument, Petitioner's attorney referred to the victims' criminal histories. Tr. at 638-39. The prosecutor's argument is a response to that line of argument; it asks the jury not to allow negative views about the victims or witnesses to

excuse the crime charged in this case, and stresses that convicting Petitioner would not be tantamount to approval of drug dealers. Read in context the statement declares that the jury must convict Petitioner if he is proved guilty beyond a reasonable doubt even if the victims were also criminals. The Court is not persuaded that the argument is improper, and there is no manifest injustice.

H. Ineffective Assistance of Appellate Counsel

Within this claim, Petitioner alleges three instances of ineffective assistance of appellate counsel. The first relates to the failure to raise the issue addressed in Part II(A), above. The Court has already concluded that claim lacks merit, so there could be no prejudice from appellate counsel's failure to raise the claim on appeal.

The second instance involves appellate counsel's failure to present Bascom's affidavit to the Missouri Court of Appeals. It is doubtful that there was a procedure permitting appellate counsel to take this action. State v. Skillicorn, 944 S.W.2d 877, 896 (Mo.) (en banc), cert. denied, 522 U.S. 999 (1997); State v. Gray, 24 S.W.3d 204, 209 (Mo. Ct. App. 2000). Even if the Missouri Court of Appeals would have acknowledged the existence of such a procedure, it likely wold not have employed it here because Bascom's affidavit was not substantive evidence that would have "completely exonerated" Petitioner. State v. Suter, 931 S.W.2d 856, 864 (Mo. Ct. App. 1996). More importantly, however, Petitioner has not demonstrated it was physically possible for appellate counsel to have taken advantage of any such procedures. Bascom's affidavit is dated August 16, 1994, and the Missouri Court of Appeals issued its decision exactly one week later. There is no indication anywhere in the record as to if and when appellate counsel received a copy of Bascom's affidavit. Finally, the Court holds that Strickland's prejudice prong was not violated because

Petitioner could still have asserted a claim of newly discovered evidence in a state habeas proceeding. E.g., Wilson v. State, 813 S.W.2d 833, 834-35 (Mo. Ct. App. 1991).

The third ground alleges appellate counsel should have raised an argument regarding governmental tampering with witnesses at trial and at the Rule 29.15 hearing. Petitioner's argument to the contrary, there is nothing in the record to support making such allegations on appeal. Consequently, the failure to do so constituted a reasonable decision on counsel's part. Cf. Roe v. Delo, 160 F.3d 415, 418 (8th Cir. 1998) (describing need for appellate counsel to "screen [] out" the weaker claims).

I. False and Perjured Testimony

Acting pro se, Petitioner presents arguments that mirror those raised by counsel in Part II(B), above. For the reasons previously discussed, the Court rejected Petitioner's pro se arguments.

J. False and Perjured Testimony Regarding "Deals"

In another argument challenging the prosecutor's use of allegedly perjured testimony, Petitioner focuses upon Mammolito's testimony on direct testimony that he had not entered an agreement in exchange for his testimony. On cross examination, Mammolito agreed that he had been promised he would not be prosecuted for his part in the kidnapings and that his testimony would not be used against him. Petitioner contends this exchange, coupled with the other "evidence" of a deal discussed previously in Part II(B), demonstrates the improper use of perjured testimony.

Assuming without deciding that Mammolito's testimony was perjurious for failing to disclose the agreement not to

prosecute him, there is no likelihood that the jury was mislead because he admitted to the true facts during cross-examination. The remaining allegations regarding Mammolito's testimony were discussed in Part II(B) and will not be delved into further.

K. Failure to Give Special Instruction Regarding Accomplice Testimony

Petitioner contends the trial court erred in failing to give his proposed instruction that advised the jury to carefully consider Mammolito's testimony and that it was for the jury to decide whether Mammolito's testimony was influenced in any way by the prosecutor's agreement not to charge him with crimes or to otherwise curry favor from the government. The jury was read a general instruction regarding credibility, which told the jury that in assessing a witness' credibility it could consider, *inter alia*, "any interest, bias or prejudice the witness may have . . . And any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness." Legal File at 23 (Jury Instruction No. 1, ¶3).

Instructional error generally arises under state law and for that reason is not cognizable in a habeas proceeding absent violation of a specific constitutional guarantee. Here, Petitioner raises no constitutional issues, so his claim is not cognizable.

L. Failure to Suppress Heldebrand's Identifications

This issue was fully address in Part II(C) and further discussion is not required.

M. Failure to Present Alibi Witnesses or Call Petitioner to Testify

This issue was fully addressed in Part II(E) and further discussion is not required.

N. Admission of Hearsay

Petitioner contends that Sharon Dugan's testimony that Gary Engel told her the ring he gave her came from a person "they" kidnaped in Kansas City was inadmissible hearsay. The Court will accept, for the sake of argument, that the hearsay (for that is what it is) was not admissible under the co-conspirator exception. Nonetheless, the claim is rejected because (1) the claim was procedurally defaulted and (2) any error was harmless.

The issue was raised in a motion in limine, which was denied. No objection was made at trial, but the issue was reasserted in post-trial motions and on appeal. The Missouri Court of Appeals declined to review the issue, holding that "[w]here no objection is made, the admission of hearsay evidence is not plain error." Manning, slip op. at 14.

Petitioner attempts to avoid the procedural default by arguing that his appellate counsel was ineffective for failing to argue that the motion in limine was sufficient to preserve the issue for review. Petitioner's premise about this argument's validity is flawed. Rulings on motions in limine are interlocutory and preserve nothing for review. E.g., State v. Woods, 639 S.W.2d 818, 820 (Mo. 1982); State v. Hemphill, 669 S.W.2d 633, 635 (Mo. Ct. App. 1984). The case upon which Petitioner relies observed the "general requirement" that an objection be made at trial in order to preserve a claim of error, but held the general rule was not applicable because the parties "agreed that in the interest of clarity and judicial economy, the trial court would take the motion to suppress along with the case." State v. Ross, 680 S.W.2d 213, 215 (Mo. Ct. App. 1984). There is no basis for invoking that exception here.

In any event, the error (if any) was harmless. Dugan

testified that Engel gave her the ring, and Ford identified the ring as his. Mammolito also testified about the incident in which Engel took the ring from Ford, as well as Engel's involvement in the kidnaping. All of this testimony was admissible. The only additional fact gleaned from Engel's statement is the admission that some unidentified "they" kidnaped a someone in Kansas City and took his ring. This statement does not implicate Petitioner because he was not named, so its admission was harmless.

Petitioner also challenges the admission of the ring, but (1) this claim was procedurally defaulted and (2) this issue raises a question of state evidentiary law that is not cognizable in a habeas proceeding. This claim is rejected.

O. Actual Innocence

In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court pointed out that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Although actual innocence plays a role in habeas proceedings, it does so long as a supplement to a constitutional claim - not as an independent claim. Id. at 404. This distinction was emphasized in Schlup; a free-standing claim of actual innocence is governed by Herrera, whereas a claim of actual innocence used to demonstrate cause and prejudice to overcome a procedural bar to federal review is governed by a different standard (as later announced in Schlup). 513 U.S. at 315-17. The Court went on to explain the different standards as follows:

> If there were no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is

> itself convinced that those new facts unquestionably establish [petitioner's] innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, [petitioner's] threshold showing of innocence would justify a review of the merits of the constitutional claims.

Schlup, 513 U.S. at 317.

Subsequent Eighth Circuit opinions do not make clear whether Herrera (1) completely bars free-standing claims based on actual innocence or (2) merely erects an extremely high standard for such claims. Herrera was decided in 1993, and Schlup was decided in 1995. Four months after Schlup was decided, the Eighth Circuit cited it for the proposition that a free-standing claim of actual innocence is cognizable and relief can be granted only if the new facts "unquestionably establish [the petitioner's] innocence.'" Allen v. Nix, 55 F.3d 414, 417 (8th Cir.), cert. denied, 516 U.S. 1014 (1995) (quoting Schlup, 513 U.S. S.Ct. at 317). Later, in Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996), the Eighth Circuit was again presented with a free-standing claim of actual innocence and characterized Herrera as "reject[ing] free-standing claims of actual innocence as a basis for habeas review," and held that a "claim of innocence based on newly discovered evidence is not cognizable on habeas review." 99 F.3d at 283. Finally, in Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997), the Eighth Circuit relied on Allen and subjected a free-standing claim of actual innocence to the "unquestionable innocence" standard. 119 F.3d at 1334.

Resolution of Petitioner's claim is easy if the claim is

not cognizable: if it is not cognizable, no relief can be granted. However, the law in this circuit is not clear, and the Court notes that Cornell and Allen have been cited with greater regularity than Meadows. Consequently, it is prudent for the Court to consider Petitioner's claim under the standard described in Cornell and Allen. This, too is an easy matter: having failed to satisfy the lesser Schlup standard, Petitioner cannot satisfy the higher standard described in Cornell and Allen.

III. CONCLUSION

For the foregoing reasons, Petitioner's application for a Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

\s\
ORTRIE D. SMITH, JUDGE
DATE: 4/17/01 UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

STEVEN L. MANNING,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 97-0336-CV-W-3
	)	
MICHAEL BOWERSOX and	)	
JEREMIAH (JAY) NIXON,	)	
	)	
Respondents.	)	

ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT

Petitioner's Motion to Alter or Amend (Doc. #91) is denied.

IT IS SO ORDERED.

\s\ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: June 18, 2001

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
v.	)	
	)	WD 45206
STEVEN L. MANNING,	)	
	)	
Appellant,	)	(Consolidated with WD48411)
	)	
	)	Order Filed:
STEVEN L. MANNING,	)	August 23, 1994
	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF ORDER

This memorandum is for the parties' information and sets forth the reasons for the order affirming judgment.

Steven L. Manning appeals his convictions, following a jury trial on January 22-24, 1992, of two counts of kidnapping and two counts of armed criminal action. The trial court declared Manning to be a prior offender and sentenced him to

two life sentences for the kidnapping charges and two 50 year sentences for the armed criminal action charges. Manning asserts several contentions of error on appeal. He contends that the trial court committed plain error in admitting the testimony of an accomplice's ex-wife, admitting into evidence a bugging device seized from an accomplice's apartment, and submitting the reasonable doubt instruction patterned after MAI-CR3d 302.04. He also claims the trial court erred in refusing to instruct the jury that the testimony of accomplices must be carefully scrutinized and in overruling his objection to the state's closing argument.

Further, he appeals the denial of his Rule 29.15 motion for postconviction relief. He asserts that he was denied effective assistance of counsel because his attorney failed to (1) file a motion to suppress the identification testimony of the kidnapping victim's sister, Carolyn Heidebrand, (2) allow Manning to testify, (3) present an alibi defense for Manning, and (4) file a motion to suppress Manning's statements to Sylvia Herrera in a letter arranging an alibi. He also asserts that his postconviction counsel failed to properly investigate his case to discover the allegation raised in the supplemental amended motion. Finally, he contends that the motion court clearly erred in denying his 29.15 motion because it failed to conduct any inquiry as to whether the lateness of Manning's motion resulted from the actions of counsel or Manning. We affirm the trial court's judgment and the denial of Manning's Rule 29.15 motion.

FACTS[1]

Charles Ford was a drug dealer who owned The Irish

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[1]We view the evidence in a light most favorable to the jury's verdict.

Crook Tavern at 5th and Walnut in Kansas City. Anthony Mammolito's wife owned Jaime's Lounge across the street. Mammolito knew Ford. Ford's brother-in-law, Goldyn,[2] was a frequent patron of Jaime's Lounge. Goldyn told Mammolito that he thought Ford was worth a lot of money and had access to $200,000 to $250,000 because of his drug dealings.

In early 1984, Mammolito went to Chicago to recruit individuals to help him kidnap Ford. Mammolito went to the house of a former fellow prison inmate, Thomas McKillip, and asked McKillip's help in kidnapping Ford. McKillip made a telephone call. About 15 to 20 minutes later, Manning showed up at McKillip's house. After discussing the kidnapping plans, Manning recruited Gary Engel to help with the kidnapping. The next night, Manning, Engel, McKillip and Mammolito met at Engel's house and discussed the kidnapping. Mammolito then returned to Kansas City.

A week or two later, McKillip drove to Kansas City and met with Mammolito. He told Mammolito that Manning and Engel would be flying from Chicago that night. McKillip showed Mammolito the paraphernalia that he had brought with him, including police radios for cars, hand-held radios, an assortment of badges from law enforcement agencies, search warrants, a red light, handcuffs, pistols, and a utility line repairer's belt. Later that night, Mammolito and McKillip picked up Manning and Engel at the Kansas City airport.

Mammolito, McKillip, Manning and Engel began following Ford. They followed him to the airport and watched him board a plane. They later learned that Ford's mother-in-law had died and that Ford was traveling to attend her funeral. Because nothing could be done until Ford returned, Manning

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[2]The record reflects no more identity than this.

and Engel went back to Chicago.

Manning and Engel returned to Kansas City a couple of days later. Mammolito and McKillip dropped Manning and Engel off in the Fairfax area of Kansas City, Kansas, for the purpose of stealing a car to use in the kidnapping in the meantime, Mammolito and McKillip went to the house of Ford's sister, Carolyn Heldebrand, to plant a bugging device on Heldebrand's telephone. McKillip put on the utility line repairer's belt and a "Ma Bell" identification and climbed a telephone pole across the street. McKillip attached a bugging device to Heldebrand's telephone line. An FM radio could pick up the device's signal.

Later Mammolito, McKillip, Manning and Engel met at a "safe house." While there, they installed a red light, police radios, a police scanner and an antenna to a car stolen by Manning and Engel. They then began watching Ford's apartment in Kansas City. Manning and Engel were in the stolen vehicle in one parking lot, and Mammelito and McKillip were in McKillip's car in another parking lot.

Ford and a friend, Mark Harris, arrive at the apartment at about 2:30 to 3:00 A.M. As they were getting out of Ford's truck, Manning and Engel ran up to them displaying badges and guns and yelling that they were DEA agents and that Ford and Harris were under arrest. Ford and Harris were told to face the truck and to put their hands on the truck as Manning and Engel searched them. They took a gun from Ford's pants. They handcuffed Ford and Harris and placed them in the back seat of the stolen car. They placed duct tape over Ford's and Harris' eyes.

Manning and Engel drove the stolen car with Ford and Harris in it. McKillip drove Ford's truck, and Mammolito drove McKillip's car back to the "safe house." Once there,

Ford and Harris were handcuffed to a pole in the garage. Mammolito avoided Ford because Ford knew him and knew his voice. One of the kidnappers informed Ford that there was a contract on his life, and that someone had offered $100,000. Ford told them that he did not think he could come up with $100,000, but the kidnappers told him to come up with what he could.

The kidnappers allowed Ford to make some phone calls to raise money. They planned to pick up any money Ford could raise at Heldebrand's house. Heldebrand gathered $5000 and put it into a sack. Ford's friends went to Ford's apartment and picked up a briefcase full of money and dropped it off at Heldebrand's house.

Manning drove Ford's truck to Heldebrand's house to pick up the money.[3] Heidebrand handed him a sack of money. When he returned to the safe house, Manning was angry about the small amount of money in the sack, and he threatened to kill Ford and Harris. He hit Harris with a pipe. Ford called his sister and told her that she had forgotten the briefcase full of money. Manning went back to Heldebrand's house and picked up the briefcase.

In total, the kidnappers received about $30,000 to $50,000. They informed Ford that they would be back in about 30 days to collect the rest of the money. They divided up the money and left a 10 percent share in the freezer of the safe house for the tipster, Goldyn. Engel also took one of Ford's rings.

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[3]Heidebrand testified that only one man came in the truck to pick up the money. Mammolito testified that he and Manning went to Heidebrand's house to pick up the money.

The kidnappers then put Ford and Harris in a car, and Manning and Engel drove them to a cemetery on Blue Ridge. They removed the handcuffs on Ford and Harris but bound their hands with duct tape. They told Ford and Harris to sit down for a while before trying to get loose. They left Ford's truck nearby. Manning and Engel drove away and headed to Kansas City International Airport to return to Chicago.

Ford and Harris removed the duct tape and drove Ford's truck to Ford's bar. They did not immediately seek police help because of Ford's drug dealings and because they were concerned that the kidnappers would return in 30 days. Ford acknowledged the kidnapping to police in 1990, when he was negotiating a guilty plea to a drug charge.

In early 1984, a Southwestern Bell Telephone Company technician removed a bugging device from a telephone pole near Heldebrand's house. The Federal Bureau of Investigation found a similar device in Engel's apartment in Chicago in August 1990.

In February 1984, Lillian Schoenberger's car, a 1984 Chevrolet Caprice, was stolen from the Fairfax area of Kansas City, Kansas. Police found the car on July 12, 1984, at Kansas City International Airport. A key was jammed in the car's ignition, and a hole, which could have facilitated an antenna or similar device, had been cut in the car's rear quarter panel.

In 1986, an FBI agent searched a storage locker belonging to Manning in Chicago. He found a paper with McKillip's name on it, two or three Illinois identification documents, a Minnesota driver's license, a Chicago police uniform badge, a Cook County Sheriff's Department badge, a document with Manning's picture and the name Steve Rosenbloom on it, assorted documents with other people's names on them, a document with Harris' name on it and

descriptive information about him, a telephone bugging device, a police-type transmitter and receiver, and a portable antenna. Manning admitted that the items belonged to him.

Buffalo Grove, Illinois, police received a ring from Sharon Dugan, Engel's ex-wife. Dugan testified that she took Engel to the airport two times in 1984 so that he could travel to Kansas City. When she picked him up at the airport after his second trip to Kansas City, Manning was with Engel. Engel gave her a ring and told her that he had gotten it from a person they had kidnapped in Kansas City. Dugan turned the ring over to law enforcement officers. Ford identified the ring as the one taken from him during the kidnapping. Dugan also testified that she overheard Engel and McKillip talking about going to Kansas City and acting as DEA agents to rip off drug dealers.

In June 1990, Heldebrand identified Manning in a photograph lineup as the man who picked up the ransom money. She also identified Manning at trial. Heldebrand, however, was unable to identify appellant at a deposition at which he was present or at the first trial.[4]

Sylvia Herrera testified at trial that she knew Manning through her boyfriend, Tommy Dye, who asked her in late 1990 to help provide Manning an alibi for certain dates in February 1984. Herrera saw Manning in jail, spoke to him on the telephone, and received letters from Manning. Herrrera went to a library and got copies of the *Sun Times* newspaper for Manning so that he could review what movies and events occurred during the period in question. Manning asked Herrera for information about her family. He instructed her to say that Manning was with her family during the days in which the kidnapping occurred and that they went to movies and did other

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[4]The first trial ended in a mistrial.

things together. Manning told Herrera that she and her family would be paid thousands of dollars for providing him with an alibi.

Identification Testimony

In his first point on appeal, Manning asserts that his attorney was ineffective for failing to move to suppress Heldebrand's in-court and out-of-court identifications. Manning complains that the photo lineup from which Heldebrand identified him was unduly suggestive and Heldebrand's identification was unreliable. We disagree.

To establish ineffective assistance of counsel, Manning must show that his attorney did not exercise the customary skill and diligence a reasonably competent attorney would have exercised and that this prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We presume Manning's attorney to have been competent and that the deficiencies complained of were sound trial strategy. *Id.; State v. Stepter*, 794 S.W.2d 649, 656 (Mo.banc 1990). Our review of a motion court's denial of a Rule 29.15 motion is limited to determining whether the findings, conclusions, and judgment of the motion court were clearly erroneous. *State v. Ervin*, 835 S.W.2d 905, 928 (Mo.banc 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1368 (1993). We will deem the findings and conclusions of the motion court to be clearly erroneous only if we are left with a definite and firm impression that a mistake has been made. *Id.*

"To demonstrate a counsel's ineffectiveness in failing to seek suppression of evidence, a defendant must establish that his claim is meritorious and 'that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.'" *State v. Neal*, 849 S.W.2d 250, 258 (Mo.App. 1993) (citing

Kimmelman v., Morrison, 477 U.S. 365, 375 (1986)). We will not deem counsel to have been ineffective for failing to file a meritless motion or for failing to object to admissible evidence. *State v. Hunter*, 840 S.W.2d 850, 870 (Mo.banc 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3047 (1993); *State v. Twenter*, 818 S.W.2d 628, 643 (Mo.banc 1991).

Manning claims that because his photograph was in two different photographic arrays and his photograph was the only one in both arrays, the photographic lineup shown to Heldebrand was unduly suggestive. This same contention was rejected in *State v. Garrett*, 825 S.W.2d 954 (Mo.App. 1992), in which the court concluded, "Defendant's contention that because the defendant was the only person in the lineup whose photograph was among the six photographs previously displayed to [the witness] maybe an appropriate jury argument challenging the reliability of her identification. It is not, however, impermissibly suggestive". *Id*, at 958. Manning's contention is without merit.

Manning also assets that Heldebrand's identification was inherently unreliable. Heldebrand admitted at trial that she looked only at the man who came to pick up the ransom money "somewhat" and that she tried not to stare at him. Further, although she identified Manning in the photographic lineup and at the second trial, she was unable to identify Manning at the first trial or at a deposition at which she sat across the table from him for a couple of hours.

Manning's trial counsel testified at the Rule 29.15 hearing that he wanted to have Heldebrand testify at trial because her testimony conflicted with Ford's and Mammolito's testimony and because she had not been able to identify Manning at the deposition. Allegations of ineffective assistance of counsel relating to matters of trial strategy do not provide a basis for postconviction relief. *Rainwater v. State*, 770 S.W.2d

368, 370 (Mo.App. 1989). Counsel is allowed wide latitude in conducting a defense and may use his best judgment in matters of trial strategy. *Stuckey v. State*, 756 S.W.2d 587, 593 (Mo.App. 1988). Whether or not to file a motion to suppress is a matter of trial strategy left to counsel's determination. *State v. Sanders*, 539 S.W.2d 458, 461 (Mo.App. 1976). We agree with the motion court that trial counsel's decision to allow Heldebrand to testify was a valid trial strategy calculated to aid the defense and did not demonstrate any ineffectiveness.

Allowing Manning to Testify

Manning complains that the motion court erred when it denied his Rule 29.15 motion because he established that his trial attorney was ineffective for not allowing him to testify at trial. Manning asserts that he was ready to testify, but he was not permitted to do so. We disagree.

At trial, the trial court addressed the issue with Manning:

THE COURT: The State has indicated at this time that they intend to rest their case. And in that regard your attorney will have the opportunity to present evidence on your behalf. And you understand that?

[MANNING]: Yes, I do.

THE COURT: And do you understand that one of the rights which you have is the right not to take the witness stand and not to testify.

[MANNING]: Yes, I do.

THE COURT: And do you understand if you elected to waive that right and to take the witness stand in this case, that

any statement which you made in response to a question which might be asked by your attorney or which you might volunteer or which [the prosecutor] might ask you about could serve to incriminate or be harmful to your position in this case, you understand that?

[MANNING]: Yes, I do.

THE COURT: And you also understand if you do not take the witness stand that [the prosecutor] will not have the right to comment to the jury nor will the jury to [sic] draw any inference of guilt from your failure to testify, do you understand that?

[MANNING]: I believe that's right. I agree.

THE COURT: And furthermore, without discussing with me what you may have talked with your attorney about, are you satisfied that [your attorney] has called those persons and have them available for you in this case that you believe are important to your position?

[MANNING]: I'm satisfied with my representation, yes, I am.

THE COURT: Well, I'm not asking you about whether you're satisfied with the way you've been represented. I'm only asking you at this point in time whether you're satisfied that whoever you have asked him to call on your behalf he has in fact called or followed your instructions in that regard.

[MANNING]: Yes, he has.

THE COURT: In other words, I want to know whether there has in that connection the calling of the witnesses whether it has been any refusal [by your attorneys] to subpoena or call

someone on your behalf.

[MANNING]: Everything is fine. No refusal. Everything has been done correctly.

Manning's attorney testified at the Rule 29.15 hearing that the decision on whether or not Manning would testify was entirely Manning's decision.

The trial court advised Manning of his rights regarding the right to testify and asked him if his attorney had called all the persons who Manning believed were important to his case. Manning told the trial court that he was satisfied with his attorney's handling of his case. Nor did Manning make any objection to the court about wanting to testify throughout the court's discussion with him.

"In determining the issue of ineffective assistance of counsel, the motion court is free to believe or disbelieve evidence, whether contradicted or undisputed." *State v. Buchanan*, 836 S.W.2d 90, 93 (Mo.App. 1992). Unless our review of the entire record leaves us with a definite, firm impression that the motion court was mistaken in its conclusions, we must affirm its judgment. *State v. Anderson*, 785 S.W.2d 596, 600 (Mo.App. 1990). We discern no basis for reversing the motion court.

Alibi Defense

Manning asserts that his trial attorney was ineffective for failing to call Corine Robin as an alibi witness. During the first trial, Robin testified that she lived with Manning and his girlfriend in January and February 1984 and that she did not have any knowledge of Manning's leaving Chicago during that time.

Manning's trial counsel testified at the Rule 29.15 hearing that he did not call Robin during the second trial because she had told his investigator that her husband was secretly held by the government and drugged to learn secrets about the Russian government. Manning's attorney stated that he had serious concerns at that point about Robin's ability to recall and relate information.

If an attorney believes that a witness' testimony would not be helpful to his client's position, the decision not to call her is a matter of trial strategy and will not support a Rule 29.15 motion for postconviction relief. *Laws v. State*, 708 S.W.2d 182, 187 (Mo.App.), *cert. denied*, 479 U.S. 871 (1986).

Manning's attorney was aware of the potential risks and benefits of calling Robin as a witness and made a strategic decision not to call her. Manning represented to the court at trial that his attorney had called all the witnesses he wanted called. We conclude that the attorney's decision not to call Robin as a witness was a matter of trial strategy which was appropriate under the circumstances and did not demonstrate ineffectiveness.

Manning's Letters to Sylvia Herrera

Manning asserts that the motion court committed plain error in denying his Rule 29.15 motion because his trial counsel was ineffective for failing to file a motion to suppress Manning's statements to Herrera in a letter which he had written her arranging a false alibi defense. Manning contends that the statements were the "fruit of the poisonous tree" because the statements to Herrera were made as a result of a state informant, Tommy Dye, being planted in the Cook County Jail. Manning's Rule 29.15 motion stated:

The evidence introduced as a result of an agent working

for the government being planted in the Cook County Jail for the purposes of soliciting information which could later be used against movant. Movant was prejudiced because evidence was introduced at trial that movant discussed falsifying an alibi which resulted from the contact by the government's undercover agent. Had trial counsel filed said motion the issue of whether the evidence was legally obtained or was the "fruit of the poisonous tree" could have been litigated prior to trial and there is a reasonable probability that the evidence would have been found to be inadmissible or alternatively, if the trial court had overruled the motion to suppress, the issue could have been preserved for appellate review.

The record shows that Manning's attorney did file a motion in limine to suppress the evidence. The motion, styled "Defendant's Motion in Limine Regarding Alleged Attempt to Fabricate Alibi Defense," was filed on October 8, 1991. The trial court denied the motion before the first trial. The state filed a response to the motion in limine prior to the second trial, and Manning's attorney renewed the motion in limine at the second trial. No pretrial evidentiary hearing was held, but the trial court took the motion with the case. When Herrera was called to the stand and testified about the letter, Manning did not object to the letter on the ground that it was the fruit of the poisonous tree.

As previously stated, to prevail on a claim of ineffective assistance of counsel, Manning must establish his attorney failed to use the customary skill a reasonably competent attorney would have used in similar circumstances, and he was prejudiced thereby. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo.banc 1987). Both prongs must be satisfied, and this court is free to examine the prejudice prong first. *Id.*

We find no prejudice. To establish that an attorney was ineffective for failing to file a motion to suppress, a defendant

must show that his claim is meritorious and that a reasonable probability exists that the verdict would have been different absent the excludable evidence. *Neal*, 849 S.W.2d at 258. Even if the letter to Herrera should have been suppressed, and we do not so conclude, ample evidence was presented to the jury from which they could have concluded that Manning was guilty of the charged offenses beyond a reasonable doubt.

Testimony of Sharon Dugan

Manning alleges that the trial court committed plain error in allowing Dugan to testify that Engel had given her a ring and told her that he had acquired the ring from someone he had kidnapped in Kansas City. Manning asserts that this testimony was hearsay and violated his rights to confront and cross-examine the witnesses against him, to a fair trial and to due process of law.

We fail to discern evident, obvious and notorious error in admitting this testimony, as we must do to accord plain error review pursuant to Rule 30.20(b). *State v. Bailey*, 839 S.W.2d 657, 661 (Mo.App. 1992). Where no objection is made, the admission of hearsay evidence is not plain error. *State v. Lewis*, 809 S.W.2d 878, 879 (Mo.App. 1991).

Accomplice Instruction

Manning contends that the trial court erred in refusing to instruct the jury that the testimony of accomplices must be carefully scrutinized. He asserts that the testimony of his alleged accomplice, Mammolito, was essentially uncorroborated as to Manning's complicity in the charged offenses. Manning offered jury instruction number A which stated:

You have heard testimony from Anthony Mammolito

who stated that he participated in the crime charged against defendant. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves. Whether or not his testimony may have been influenced by his desire to please the government or to strike a good bargain with the government about his own situation is for you to determined.

The trial court gave the jury the general credibility instruction, MAI-CR3d 302.01. It is well settled that a trial court does not err in declining to submit an additional instruction on witness credibility beyond MAI-CR3d 302.01. *State v. Wright*, 751 S.W.2d 48, 53 (Mo.banc 1988). Manning's contention is without merit.

Prosecutor's Closing Argument

Manning further asserts that the trial court erred in allowing the prosecutor to argue scare tactics to the jury in his closing argument. We disagree.

Although Manning objected to the prosecutor's closing argument at trial, he objected on grounds different from that which he now asserts on appeal. Hence, Manning asks that if his objection was not sufficient to preserve the issue for appeal then we review for plain error. A point raised on appeal must be based upon the theory of objection raised at trial. *State v. Foulk*, 725 S.W.2d 56, 69 (Mo.App. 1987). We conclude that Manning did not preserve the issue for appeal and that the alleged error does not constitute evident, obvious and notorious error. *See Bailey*, 839 S.W.2d at 661. A claim of plain error based on matters contained in arguments rarely justifies relief on appeal, unless the argument had a decisive effect on the jury. *State v. Schlup*, 785 S.W.2d 796, 802 (Mo.App. 1990).

In his closing argument, the prosecutor stated:

. . .Find the defendant guilty. He came down from Chicago and committed an offense not just against Charlie Ford and Mark Harris but against Clay County.

. . . .

Tell him that Clay County does not–

[MANNING'S ATTORNEY]: Objection, Your Honor, the laws in Clay County are not different than any place else in the country.

THE COURT: Overruled. Proceed.

[PROSECUTING ATTORNEY]: Tell him Clay County doesn't like crime. Justice has to be even-handed. When the evidence is presented we don't shirk from our responsibility. Proof beyond a reasonable doubt will convict. You don't send the defendant a message that you like drugs, that you like Charlie Ford, that you like Mark Harris; you send him the message that you do crime in Clay County, you're going to be held accountable. We don't like crime.

Prosecutors may argue the prevalence of crime in the community, the personal safety of its inhabitants, the jury's duty to uphold the law, and inferences from its failure to convict. Such pleas call upon common experience. *State v. Schwer*, 757 S.W.2d 258, 264 (Mo.App. 1988). "A prosecutor may legitimately argue that the jury should 'send a message' that criminal assault will not be tolerated or should be severely punished." *State v. Cobb*, 875 S.W.2d 533, 537 (Mo.banc 1994). In this case, the prosecutor's argument urged stricter law enforcement' it did not appeal, as Manning suggests, to the jurors' passions and prejudices. We conclude that the prosecutor's comments did not have a decisive effect on the jury so as to rise to the level of plain error. Manning's point on

appeal is denied.

The Bugging Device

Manning contends the trial court committed plain error in admitting into evidence the bugging device seized from Engel's apartment. Manning asserts that any probative value the evidence had was outweighed by its prejudicial effect. We fail to discern evident, obvious and notorious error in admitting this evidence. *See Bailey*, 839 S.W.2d at 661.

A trial court is vested with broad discretion in ruling on questions of relevancy of evidence and, in the absence of a clear showing of an abuse of discretion, we will not interfere with the trial court's ruling. *State v. Ramsey*, 820 S.W.2d 663, 667 (Mo.App. 1991). To establish an abuse of discretion, a defendant must show that reasonable persons could not differ as to the propriety of the action taken by the trial court. *State v. Jimerson*, 820 S.W.2d 500, 502 (Mo.App. 1991).

Admission of the bugging device corroborated Mammolito's testimony about the kidnapping and showed that the kidnappers had access to bugging devices similar to that which was used on the telephone line of the kidnapping victim's sister. Evidence which tends to corroborate the testimony of a witness is admissible. *State v. Powell*, 793 S.W.2d 505, 507 (Mo.App. 1980). We conclude the trial court did not plainly err in admitting the bugging device into evidence.

Reasonable Doubt Instruction

Manning alleges that the trial court committed plain error in submitting the reasonable doubt instruction patterned after MAI-CR3d 4302.04. He asserts that it unconstitutionally lowered the state's burden of proof by equating "reasonable

doubt" with proof that leaves the jury "firmly convinced" of guilt.

The Missouri Supreme Court has repeatedly upheld the validity of MAI-CR3d 302.04 against identical constitutional challenges. *State v. Griffin*, 848 S.W.2d 464, 469 (Mo.banc 1993); *State v. Blankenship*, 830 S.W.2d 1, 13 (Mo.banc 1992). Manning's point is denied.

The Amended Postconviction Motion

Manning asserts that the motion court clearly erred when it denied his Rule 29.15 motion without determining whether he was abandoned by his postconviction counsel. Manning contends, pursuant to *Sanders v. State*, 807 S.W.2d 493 (Mo.banc 1991), that his counsel's failure to file a timely amended motion constituted abandonment and that the trial court should have inquired into whether the untimeliness was due to the actions of counsel or Manning. Manning requests that we reverse the motion court's denial of postconviction relief and remand for a hearing pursuant to *Sanders*.

Manning filed his *pro se* Rule 29.15 motion on May 21, 1992. The court appointed counsel to assist him on August 3, 1992, and on October 26, 1992, Manning's counsel filed an amended Rule 29.15 motion. We agree with Manning that his counsel's motion was filed more than 60 days after his appointment in violation of Rule 29.15(f). The motion court, however, held an evidentiary hearing and ruled on the merits of Manning's amended motion. This court's Southern District dealt with this exact issue in *Holt v. State*, 811 S.W.2d 827 (Mo.App. 1991), and concluded:

The present record is sufficient for review of the correctness of the trial court's order denying movant relief on the amended motion. In the interest of expedition and judicial economy, this

court reviews on the merits the point sought to be raised by movant in his amended motion and his original brief.

Id. at 828. Manning's point is without merit.

Ineffective Assistance of Rule 29.15 Counsel

Manning asserts that he was denied effective assistance of Rule 29.15 counsel because his attorney failed to properly investigate the case and to timely discover an allegation that was raised in the supplemental amended motion filed on the day of the hearing out of time. Manning acknowledges that the Missouri Supreme Court has held that there is no right to challenge the assistance of postconviction counsel on direct appeal of the postconviction motion. *See Lingar v. State*, 766 S.W.2d 640 (Mo.banc), *cert. denied*, 493 U.S. 900 (1989). He asserts that he raises the allegation for purposes of "federal preservation."

No constitutional right to counsel exists in a postconviction proceeding. *State v. Hunter*, 840 S.W.2d at 871. Hence, no claim of ineffective assistance of postconviction counsel can be made or reviewed. *Id.*

The judgments of the trial court and the motion court are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3246

Steven L. Manning,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
Michael Bowersox, et al.,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199) December 31, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI SEVENTH JUDICIAL CIRCUIT AT LIBERTY

STEVEN L. MANNING	)	
	)	
Movant,	)	
	)	
	)	Case No. CV192-3076CC
	)	
STATE OF MISSOURI	)	
	)	
Respondent.	)	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW, AND ORDER

On the 30th day of April, 1993, movant appeared through his counsel, Stephen J. Harris, office of the Central Appellate/Post Conviction Division of the Missourit State Public Defender System. Movant was not present during the hearing. Respondent, State of Missouri, appeared through Brian J. Klopfenstein, Assistant Prosecuting Attorney for Clay County, Missouri. The parties announced ready for the hearing. The Court took judicial notice of the underlying criminal file, *State of Missouri vs. Steven L. Manning*, Case No. CR191-550F. Movant filed a Supplement to Movant's Amended Motion under Rule 29.15 without objection. Movant filed his deposition which was taken on March 31, 1993, at the Cook County Department of Corrections, 2700 South California, Chicago, Illinois. The evidence presented by both sides consisted of the deposition testimony of Steven L. Manning; the testimony of Cory Robin which occured at Movan't initial trial which ended in a hung jury. Ms. Robin testified on October 8, 1991. Additionally, the Court heard evidence from Robert

Buchan, special agent with the Federal Bureau of Investigation in Chicago, Bobby May, Margaret Petifurd, Bob Petifurd, and Byron Fox, attorney for Movant during both criminal trials. Additionally, evidence was received from Movant in exhibits 1-3 and 4a-d.

Movant offered into evidence, under an offer of proof, the affidavit testimony of Marlies Vukelich and the proposed testimony of Bruce Vacarro. Neither Vukelich nor Vacarro appeared at the hearing to testify. The Respondent objected the offers of proof and the Court sustained the State's objection.

Movant's attorney was granted until June 15, 1993, to file his proposed Findings of Fact and Conclusions of Law. Respondent was granted an additional fifteen (15) days to respond after receiving Movant's proposed finding.

After considering the evidence submitted, this Court enters the following Findings of Fact and Conclusions of Law and Order:

Findings of Fact

1. Movant was arrested in Arlington Heights, Illinois, on July 26, 1990, on charges filed in a complaint in Clay County, Missouri, bearing a case number of CR191-550F.

2. On September 27, 1990, Movant was extradited to Missouri from Illinois.

3. Once Movant arrived in Missouri, Movant retained Byron Neal Fox to represent him as legal counsel.

4. Byron Neal Fox, along with assistant from Kathleen Woods, represented Movant throughout the pendency of the Clay County case. This representation included appearing at a

preliminary hearing in Associate Division 6 in Clay County.

5. Movant informed attorney Fox of his desire to use alibi witnesses to aid in his defense. The alibi witnesses provided by Movant were: Marlies Vukelich, Cory Robin, Gustave Guenthner, and Bruce Vacarro. In his deposition in support of the Motion for relief under Rule 29.15, Movant admitted not other names were provided to attorney Fox as possible alibi witnesss (Manning Deposition 57).

6. At the request of Movant, attorney Fox traveled to Chicago, Illinois in December, 1990, and interviewed Vukelich, Robin, Vacarro, and Guenthner.

7. Movant claimed the trial counsel was ineffective for failing to call the alibi witnesses at the second trial. During the first trial, Cory Robin was called as a witness (1st trial Tr. 399-416). Robin testified she was with Movant and his girlfriend in January and February, 1984, but could not be sure of exact dates. During the second trial, Movant informed the court there had been no refusal on either trial counsel's part or by Ms. Woods to subpoena or call someone on his behalf (Tr. 629).

8. Attorney Fox testified at the 29.15 hearing that he did not choose to call Cory Robin because his investigator who took Ms. Robin back to the airport reported a conversation between himself and Robin. Ms. Robin told the investigator, among other things, that her husband was secretly held by the government and drugged to learn secrets concerning the Russian government. Based upon the conversation Attorney Fox did not call Ms. Robin at the second trial because of serious concerns about her ability to recall and relate information.

9. Attorney Fox testified at the 29.15 hearing that he chose not to call Movant's girlfriend Vukelich because he learned from her that she had received written instructions on

how to testify or what to say. Fox indicated he did not want to put her on the witness stand because of a fear the letter may be discovered and substantially undermine the defense. State witness Sylvia Herrera testified she was instructed by Movant to create a false family to provide an alibi for Movant (Tr. 590-604). If Vukelich testified and the letter was discovered, Fox believed it would strongly corroborate the State's case concerning the establishment of a fabricated alibi by Movant and would seriously undermine the defense.

10. No evidence, other than the assertion of Movant, was presented that either Guenthner nor Varacco were available to testify at the second trial.

11. None of the Movant's alleged "alibi" witnesses testified at the hearing of Movant on April 30, 1993.

12. Movant was originally tried on the four (4) counts on October 8, 9, and 10, 1991 with the jury unable to reach a verdict.

13. Respondent filed an information in lieu of Indictment, on November 5, 1991, charging Movant with the same offenses as before, but, also alleging Movant to be a persistent offender under Sections 558.016 and 557.036.4 RSMo 1986.

14. At the request of Movant, his retrial was continued from November 12, 1991, until January 22, 1992.

15. Movant was retried on January 22, 23, and 24, 1992, before a jury in Clay County, Missouri. The jury returned a verdict finding Movant guilty of all four (4) counts of kidnapping and armed criminal action.

16. On April 10, 1992, the trial court considered and

overruled Movant's Motion for New Trial. The trial court sentenced Movant to a term of Life imprisonment on each of counts I and III and a term of 50 years imprisonment each on counts II and IV. The trial Court further ordered the sentences to be served consecutively and not concurrently (Tr. 729).

17. Movant claimed attorney Fox was ineffective because Fox did not attempt to suppress the out of court identification of Movant by Carolyn Hildebrand. Hildebrand was the sister of the kidnap victim Ford. Hildebrand's testimony was that she provided the money to the person or persons in a truck who drove to her residence to pick up the ransom.

18. Attorney Fox took the deposition of Carolyn Hildebrand on November 7, 1990. Movant was present in person when the deposition occured. Ms. Hildebrand did not identify Movant as being involved in the kidnapping and ransom attempt on her brother during the deposition itself.

19. Hildebrand, according to the testimony of Agent Buchan, was presented with a photo array of suspects, on June 26, 1990, to she if she coud identify any one of them as being at her house to obtain the ransom money. The only evidence presented as to a possible tainted photo lineup was the fact that Agent Buchan and Sgt. Quid of the Buffalo Grove Police Department traveled to Hildebrand's home to present the photo lineup instead of asking a local law enforcement agency to present the lineup. Movant also alleges a tainted lineup because Agent Buchan and Sgt. Quid were out to get him and that he filed a civil lawsuit against the Attorney General of the United States and the Federal Bureau of Investigation.

20. Agent Buchan testified at trial that Hildebrand identified Movant two (2) seperate times as someone she recognized or could identify from the photographs provided by

Agent Buchan (Tr. 536-538). Hildebrand testified the person she identified was the driver of the vehicle who came and picked up the ransom money (Tr. 505).

21. At the second trial of Movant, Hildebrand, in court, identified Movant as being the driver of the truck who came to her house and picked up the collected ransom amounts (Tr. 521).

22. Movant requested his trial counsel file a motion to suppress the photo identification by Hildebrand of Movant. Attorney Fox testified at the 29.15 haring that he wanted to have Hildebrand testify at trial because her testimony conflicted with testimony of other State's witnesses including her own brother Ford and witness Mammolito as to the series of events involving the collection of moneys. Attorney Fox also testified he thought about subpoenaing Hildebrand to ensure her availability at trial so that he could cross examine her as to recollection of events.

23. Movant asked trial counsel as to file a motion to suppress evidence seized, pursuant to a federal search warrant, on March 13, and 14, 1986 at locker 38, Building B; U-Store-It, Mini Storage, 903 East Algoquin Road, Arlington Heights, Illinois. Evidence which was presented to the jury, through the testimony of Special Agent John J. O'Rourke, from the search of the locker included many credit cards, police identifications, police equipment, a piece of paper bearing the name Thomas McKillip, and McKalip with descriptive information and the name Mark Wayne Harris with a social security number. Additionally, Repsondent's exhibit 34 was an electronic device used to put on telephone lines which was in a briefcase in the locker of Movant's which was searched (Tr. 548-552). The device recovered by the FBI agents during the search in March, 1986 was similar to a device recovered from co-defendant Gary Engle's apartment when he was arrested in 1990 (Tr. 539), and

a device recovered from the telephone pole near Hildebrand's residence by George Leggio in 1984 (Tr. 454-460).

24. Trial counsel did not file a motion to supress the introduction of evidence collected in a search of the storage locker on March 13 and 14, 1986. At the 29.15 hearing, trial counsel indicated he believed such a motion was meritless and could be subject to sanctions by the Court because the search was conducted pursuant to a warrant signed by a magistrate.

25. During the deposition of Movant, on March 31, 1993, Movant raised an additional claim of ineffectiveness of not injecting a defense that Movant was the subject of a government attack because he filed a civil action against the United State's Attorney General's Office, the Federal Bureau of Investigation including several assistant attorney generals and several Federal Bureau of Investigation agents. Attorney Fox testified at the 29.15 hearing that such a defense was not going to help Movant in his defense.

26. Movant alleged ineffective assistance of counsel for allowing members of the jury to commingle with State's witnesses during recesses. The Court heard testimony from Bobby May, Margaret Petifurd, and Bob Petifurd about their recollection of how the jury commingled through the back door of the courtroom. The Court's own recollection of the case, in contradiction with Movant's witnesses, was the jury was always dismissed throught the jury room and that the jury arrived and departed from a different door than identified by Ms. May and Mr. and Mrs. Petifurd. Movant presented no evidence from jurors about conversations overheard from witnesses.

27. Movant claimed ineffective assistance of counsel because the trial counsel did not attempt to suppress conversations between Movant and a fellow Cook County jail inmate, Tommy Dye. Movant claimed to be under the care of

a psychiatrist who prescribed mood altering drugs. The Court finds no conversations between Dye and Movant were admitted into evidence during the second trial.

28. Movant claimed ineffective assistant of counsel for failing to invoke the "witness rule" excluding witnesses who haven't testified from the courtroom. The state's last witness, Special Agent Gary Miller, sat through the trial and attempted to testify. Miller's testimony was only as to a foundation witness to lay the necessary foundation for the admission of taped telephone conversations between Movant and witness Herrera. The State failed to lay the necessary foundation and the tapes were not admitted into evidence.

29. Movant claimed ineffective assistance of counsel because he was forced to wear a security device during the trial and attorney Fox failed to object to him wearing the device. Movant admitted in deposition the device was placed on the inside of his leg (Movant deposition 49). Only the bar with a black strap of Velcro was visible on his sock and leg. (Movant deposition 50).

30. Movant alleged counsel was ineffective for failing to object to his characterization in the State's closing argument as being a professional criminal. Witness Mammolito testified during direct examiniation and cross examination that Movant was a very professional criminal (Tr. 353, 393, 403, and 404). The Court finds a factual basis for the statement, through the testimony of Mammolito, which did not infer superior knowledge on the part of the Prosecutor or, as suggested by Movant, imply the Movant was a career criminal.

31. Movant also alleges ineffective assistance against trial counsel because of his desire to tesify during the second trial. Movant, in his deposition, alleges he was ready to testify but that he was not permitted to testify. The Court inquired

about Movant understanding his right not to testify during the trial (Tr. 626-629). Mr. Fox indicated, while the jury was not present, his intention to offer two (2) exhibits only. Immediately after inquiring about Movant's right not to testify, the Court and counsel began discussing jury instructions to be given in the case. Mr. Fox even agreed to release the witnesses in the case prior to the jury returning, commenting, "Sure we're done" (Tr. 630). Movant did not make any objection to the court about wantin to testify throughout the entire discussion in the case. Movant, however, did indicate he was satisfied with Mr. Fox's representation in the trial (Tr. 628). Attorney Fox testified at the 29.15 hearing the decision on whether the Movant would tesify was entirely the Movant's.

32. The physical evidence corroborating the testimony of Mammolito was overwhelming all of which was consistent with Movant's guilt. The physical evidence included Ford's diamond ring which was recovered from co-defendent Engle's wife in Chicago. Three similar bugging devices which were introduced into evidence. One came from Movant's locker which was searched in March 1986. The second bugging device was recovered by Leggio from a telephone pole outside the residence of Hildebrand. The third bugging device was recovered in a search of co-defendant's residence on his arrest in 1990 for the same charges. Additionally, testimony regarding the automobile identified by Mammolito as similar to the vehicle he recalled was introduced. The vehicle was stolen from the Kansas City, Kansas in the area described by Mammolito. The vehicle was recovered at the Kansas City International Airport several months later, as Mammolito believed. The weather conditions described by Mammolito of heavy fog were corroborated by the testimony of Sarah Croke.

CONCLUSIONS OF LAW

1. The court finds that it has jurisdiction over the parties

and said cause.

2. The Court finds that Movant's motions were timely filed and properly verified pursuant to Missouri Supreme Court Rule 29.15.

3. Movant must meet the two-pronged test for ineffective assistance of counsel established in *Strickland v. Washington*, 466 U.S. 668 (1984), *Harry v. State*, 800 S.W.2d 111 (Mo. App. 1990). First the Movant must show counsel's performance was deficient. Additionally, Movant must also prove that he was prejudiced by counsel's deficient performance. To prove the deficient conduct of counsel, Movant must show that trial counsel did not exercise the customary skill and diligence that a reasonably competent attorney would have exercised in similar circustances. *Sanders v. State*, 738 S.W. 2d 856 (Mo. Banc 1987). A strong presumption exists that trial counsel's conduct falls within "the wide range of reasonable professional assistance." *Beverly v. State*, 778 S.W. 2d 297 (Mo. App. 1989), *State v. Bailey*, 839 S.W. 2d 657 (Mo. App. W.D. 1992). In order to prevail on ineffective assistant claims, that Movant must show that there is a reasonable probabiltiy that, absent the alleged error, the fact finder would have had a reasonable respecting guilt. *Beverly v. State*, 778 S.W. 2d at 298.

4. Movant allegs ineffective assistance on the basis of a failure to call four (4) separate alibi witnesses. Those witnesses are Cory Robin, Bruce Vacarro, Gustave Guenthner, and Marlies Vukelich. In order to prevail on a claim of ineffectiveness for failure to call alibi witnesses, Movant must show the witness would have testified if called, and the witness testimony would have provided a viable defense. *State v. Twenter*, 818 S.W. 2d 628 (Mo. Banc 1991). A decision by trial counsel not to call alibi witnesses does not demonstrate a lack of skill and competence when the witnesses' testimony

would have been uncertain and inconclusive regarding an alibi. *Abrams v. State*, 698 S.W. 2d 15 (Mo. App. 1985). Similary, if the attorney believes the testimony of the witness would not be helpful to the client's positon, the decision not to call him is a matter of trial strategy. *Laws v. State*, 708 S.W. 2d 182 (Mo. App. 1986).

5. Counsel for Movant testified he did not call Cory Robin as a witness because of an intriguing story about her husband being drugged by the government to learn secrets from Russia. Trial counsel's concern about Robin's ability to testify truthfully and to recall facts was a valid concern given the information he received from his investigator. Having reviewed her previous testimony in the first trial, Robin's testimony was inconclusive at establishing an alibi. A trial strategy decision to not call Cory Robin was clearly appropriate under the circumstances and did not demonstrate ineffectiveness. *Leisure v. State*, 828 S.W. 2d 872 (Mo. banc 1992).

6. Counsel for Movant testified he did not call Marlies Vukelich as a witness because her testimony would not have been helpful to Movant's position because of the instructions provided by Movant to Vukelich. The State provided evidence of an attempt to fabricate an alibi defense to the charges in Missouri. The trial strategy decision to not call Marlies Vukelich as an alibi witness was clearly appropriate given the potentially damaging testimony concerning the instructions from Movant. *Leisure v. State*, 828 S.W. 2d at 875.

7. Although asserting both Vacarro and Guenthner were available to testify, neither testified at the 29.15 hearing. Movant claimed their testimony would have provided information regarding his whereabouts during January 1984 and February 1984. Trial counsel indicated his conversations with Vacarro and Guenther did not provide specific information regarding an alibi defense. Movant offers only speculation or

conjecture as to the import of their testimony which does not rise to the level of required prejudice to prove ineffective assistance. *Camillo v. State*, 757 S.W. 2d 234 (Mo. App. 1988). Because of their failure to appear and testify at the hearing, despite the subpoena served on Vacarro, the Court is unable to ascertain as to what Vacarro and Guenthner may have testified to or the effect it may have made on the case. *State v. Patterson*, 847 S.W. 2d 935 (Mo. App. E.D. 1993). Additionally, the Court notes Movant's claim is merely that trial counsel did not call an alibi witness rather than a claim of failure to investigate. Movant's claim for ineffective assistance as to the issue of not calling alibi witnesses is hereby denied.

8. Movant also claims ineffective assistance for failing to move to suppress the photo identification by witness Hildebrand. Movant's claim of possible taint given the time which elapsed between the alleged crime and her identification is without merit. Movant has the burden of adducing facts which would indicate some sort of taint in order to present the question of suggestiveness for decision. *State v. Little*, 674 S.W. 2d 541, 544 (Mo. banc 1984). Movant has failed to meet this burden. The Court finds no facts suggesting a tainted photo identification are present. Trial counsel indicated his desire to have Hildebrand testify to refute various elements of the testimony of her brother Ford and co-conspirator Mammolito. Hildebrand actually identified Movant to court as a person driving the truck to her house to pick up the ransom money. Any claim of impropriety based upon a tainted lineup by the Federal Bureau of Investigation was removed by the in court identification by Hildebrand. Trial counsel's decision to allow Hildebrand to testify was a valid trial strategy calculated to aid the defense and did not demonstrate any ineffectivness. Movant's claim for ineffective assistance as to the issue of not seeking to suppress the identification by Hildebrand is hereby denied.

9. Movant's claim of ineffective assistant for a failure to suppress the evidence collected in a March 1986 search of a locker which Movant admitted owning is without merit. Special Agent O'Rourke testified in the first trial that he obtained a federal search warrant to search the premises (1st Tr. 42). Agent O'Rourke testifed at the second trial the Movant admitted the police uniforms, equipment, and documentation were his (Tr. 554). Any motion to suppress would have been without merit and there was no prejudice to Movant in his counsel's omission to file such a motion. *State v. Strickland*, 609 S.W. 2d 392, 395 (Mo. banc 1980); *Hines v. State*, 691 S.W. 2d 918, 920 (Mo. App. W.D. 1985).

10. Movant's claim of ineffective assistance for a failure to inject a defense of ulterior motive by the government is similarly without merit. Trial counsel was correct in electing not to follow a trial strategy which did not advance the defense. Any decision not to present Movant's claim that he was a victim of a government assualt because of his filing a civil lawsuit against the Attorney General of the United States and the Federal Bureau of Investigation would not have been helpful and was valid trial strategy. *Leisure v. State*, 828 S.W. 2d at 875. See also *Camillo v. State*, 757 S.W. 2d 234, 238 (Mo. App. W.D. 1988).

11. Movant's claim of ineffectiveness of counsel as to jury commingling presents evidence inconsistent with the Court's recollection of events. The Court clearly recalls the jury entering and exiting the courtroom through the jury room and not as described by Movant's witnesses May, Petifurd, and Petifurd. The trial court is not required to believe the testimony of witnesses. *Webb v. State*, 781 S.W.2d 163, 165 (Mo. App. 1989); *Harry v. State*, 800 S.W. 2d 111, 115 (Mo. App. E.D. 1990). This Court does not believe the testimony of Movant's witnesses May, Petifurd, and Petifurd. Additionally, Movant presents no evidence as to any conversations between jurors and

state witnesses. Movant's claim for ineffectiveness regarding jury commingling with state witnesses is denied.

12. Movant's claim of ineffectiveness of counsel for failure to invoke "The Rule" excluding the testimony of witnesses is also without merit. Special Agent Miller was the last State witness who testified in the case. His testimony was an attempt to lay a foundation for the admission of telephone tape recorded conversations between Movant and Herrera. The State was unable to lay the foundation and the jury never heard the tapes. No prejudice occured by trial counsel's failure to invoke "the Rule".

13. Movant also claimed ineffectiveness of counsel for failing to suppress the conversations between Movant and fellow Cook County inmate Tommy Dye. This Court finds no prejudice attached on counsel's failure to present medical records concerning a possible mental defense regarding Movant and mood altering drugs. Movant admitted in deposition that he was not insame (Manning Deposition 85). No conversations between Movant and Tommy Dye were presented to the jury.

14. Movant's claim of ineffective assistance of counsel concerning the security device Movant was forced to wear is without merit. Movant made no showing of prejudice in having to wear the device.

15. Movant also alleges ineffective assistant of counsel for failing to object to his characterization as a professional criminal in the State's closing argument. In order to succeed, Movant must show that an objection would have been meritorious and that the failure to object resulted in a substantial deprivation of the right to a fair trial. *Ruff v. State*, 815 S.W. 2 460, 465 (Mo. App. E.D. 1991); *Taylor v. State*, 782 S.W. 2d 741, 743 (Mo. App. 1989). The record reflects on several occasions Mammolito testified as to the professional

conduct of Movant. The State's reference to Movant being a professional criminal was in fact part of the record and was a reasonable inference from the evidence presented. Characterizing Movant as a professional criminal did not infer greater knowledge to the State and did not, as Movant suggests, imply that he was a career criminal. The failure to object does not demonstrate incompetence. *State v. Bailey*, 839 S.W. 2d 657 (Mo. App. W.D. 1992). "Any experienced trial lawyer knows...that is not always wise to make all possible objections" *Jones v. State*, 784 S.W. 2d 789, 792 (Mo. banc 1990). Finally, Movant fails to show sufficient evidence that even if objectionable, the comment would result in a substantial deprivation of the right to a fair trial. Movant's claim for ineffective assistant on this ground is denied.

16. Having considered all other claims of ineffective assistant of counsel, the Court finds all other grounds not specifically addressed in this Order do not provide sufficient prejudice to grant Movant's requested relief.

ORDER

It is therefore ordered that Movant's First Amended Motion to Vacate is hereby denied in all respects. It is further ordered that the Clerk of Clay County, Missouri, send a certified copy of this Order to counsel of record, the Missouri Department of Corrections, and the Cook County Department of Corrections.

So ordered this 11th day of August, 1993.

_____

Frank Conley
Special Judge

SEVENTH JUDICIAL CIRCUIT OF MISSOURI

CRIMINAL
Case: CR190-001699 FX
STATUS REPORT

Date: 11/21/02
Time: 12:06:27

Oper: BNT

STATE OF MISSOURI
vs.
STEVEN L. MANNING, AKA
STEVEN T. MANNING, AKA
STEVEN P. MANNING, AKA, ETAL

DOCKET ENTRIES

07/20/90	Probable cause shown; warrant ordered issued; Bond set @
0720/90	$7,500,000.00 CPB nlg
09/28/90	Comes now State by assistant prosecuting attorney ANTHONY REX GABBERT and defendant in person, and by attorney BYRON NEAL FOX Defendant arraigned, and waives readling of the information to the defendant. Defendant enters a plea of not guilty. Cause continued to 10/09/1990 @ 9:30 a./m., at which time the defendant is ordered to appear and be present. JRH sjm
09/28/90	Bond hearing set for 9:00 o'clock in the forenoon on the 4th day of October, 1990. JRH.sjm

10/04/90 The State appears by Asst P. A. R. Gabbert & Def. in person & by atty Byron Fox. Court continues the bond hearing until the 9th day of Oct. 1990 immediately following the preliminary hearing. Def. request a move to the general population of the jail, to which the State offers no objection. Court advises Sheriff that def. can be moved to general population subject to being returned to special facilities if deemed necessary by reason of the actions the deft. or to provide for the general control and well being of the jail population. JRH/sjm

10/09/90 Comes now State by attorney Rex Gabbert and defendant in person and by attorney Byron Fox and preliminary hearing is held and continued by agreement until 10/15/1990 for further evidence. CPBjeh

10/15/90 Comes now State by attorney Rex Gabbert. Defendant in person and by attorney Byron Fox. Probable cause shown. Defendant is bound over Clay County Circuit Division #I for arraignment 10/15/1990. Request for bond reduction denied. CPBjeh

10/15/90 Information filed. bay

10/15/90 Comes now state by assistant prosecuting attorney and defendant in person and by atty Byron Fox. Defendant arraigned, and defendant enters pleas of not guilty. Cause set for trial the 11/26/1990 @ 9:00 am. GMph

10/15/90 Defendant ordered to appear for docket call on 11/21/1990 @ 9:00 am GMph

10/15/90	Arguments heard re motion for bond reduction. Bond hearing cont'd to 10/29/1990 at 1:30 P.M. GMph
10/29/90	Comes now St. by asst. P.A. and deft in person and by atty Byron Fox. Evidence heard re motion for bond reduction. Cause cont'd to 10/30/1990 at 1:15 P.M. GMph
10/30/90	Comes no St. by asst. P.A. and deft. in person and by atty. Bron Fox. Further evidence heard re motion for bond reduction. Bond reduced to $1,000,000.00. GMph
11/05/90	Judge Frank Connett Jr. assigned to Div 1 as per entry filed. ph
11/15/90	State files deposition of Carolyn I. Heidenbrand. ph
11/20/90	Judge Frank Connett Jr. assigned to Div 1 as per entry filed. ph
11/21/90	Comes now state by asst. P.A. Rex Gabbert and deft. in person and by atty Kathy Woods. On application of parties cause cont'd to the 14th day of January, 1991 for trial by jury. Defendant ordered to appear for docket call on 01/09/1991 at 9:00 am. JRHph
12/10/90	Defendant file a motion for change of judge. ph
12/17/90	Defendant file a notice of hearing on motion for change of judge on Dec. 21, 1990 at 9:00 a.m. puh

01/02/91	Defendant's motion for change of judge is sustained and court requests Supreme Court appoint a judge to hear said cause. JRHjeh
01/09/91	Now comes state by asst. P.A. Rex Gabbert and the deft. in person and by attorney Kathy Woods. Cause continued to the 02/04/1991 @ 9:00 am. at which time the deft. is ordered to appear and be present. Cause set for trial setting. JRHdg
01/14/91	Order appointing Judge Frank Conley to the 7th Judicial Circuit as per entry filed.
02/19/91	Cause set for trial 04/02/1991 @ 9:00 am, in Liberty, Missouri. Jury panel of 60 jurors ordered summoned. FC/jeh
04/17/91	State files motion to dismiss. jeh
04/19/91	Cause dismissed all as per order filed. FC/jeh

DOCKET SHEET

Division 1

2/13/03 14:29:28

File No. CR191-000550 F
Circuit Court, Clay County, Missouri

Nature of Action	State of Missouri
KIDNAPPING Class A felony	Plaintiff/Petitioner
Section: 565.110	vs.

#1 STEVEN L. MANNING, AKA
#2 STEVE T. MANNING, AKA
#3 STEVE P. MANNING, AKA ET AL.

Defendant/Respondent

Count #2 [3101000] ARMED CRIMINAL ACTION - felony
Count #3 [1601000] KIDNAPPING - Class A felony
Count #4 [3101000] ARMED CRIMINAL ACTION - felony

Date	Order of the Court
Mar. 20, 1991	Indictment filed; bond set $5,000,000.00; warrant issued. JRH/bay
Mar. 21, 1991	Now comes State by Assistant P.A., John Newberg and the Defendant in person. Cause cont'd to the 28 day of April, 1991, at 9:00 o'clock a.m., at which time the Defendant is ordered to appear and be present. Copy of indictment delivered to Defendant in open court. JRH/dg
Mar. 28, 1991	Comes now State by assistant prosecuting attorney Ray Gohert and Defendant in person, and by attorney Ron Partee. Defendant

arraigned and waives reading of the indictment. Defendant enters a pleas of guilty. Cause continued to July 8, 1991 at 9:00 a.m. for trial at which time the Defendant is ordered to appear and be present.

Cause set for trial by jury.

Cause set for docket call on the 26 day of July, 1991, at 9:00 a.m., at which time Defendant is ordered to appear and be present.

Apr. 4, 1991 Defendant files motion of change of judge; together with suggestions in support thereof. dg

May 23, 1991 State files request for discovery. dg

May 23, 1991 Defendant motion for change of judge is sustained and Court requests Supreme Court to assign a judgment. JRHdg

Jun 3, 1991 Certified copy of Supreme Court order assigning the Hon. Frank Conley to hear cause is filed. mld

Jul 1, 1991 BRIAN KLOPFENSTEIN files entry of appearance on behalf of State as additional counsel. mld

Jul 10, 1991 Cause set for trial on Tuesday, 10/08/1991 at 9:00 am, in the Division Four courtroom of the Clay County Courthouse. Jury Panel of 60 jurors ordered summoned. FC/jeh

Sep 13, 1991 State files motion for order compelling

appearance by out of state witness. jeh

Sep 23, 1991 Check for out of state witness fee and three certified copies of order and certificate mailed this date to: Clerk of the Circuit Court, Room 801, Law Division, Richard J. Dailey Center, Chicago, Illinois 60602. jeh

Oct 8, 1991 Defendant files motion to dismiss with memorandum of points and authorities; together with motion to limine regarding alleged attempt to fabricate alibi defense; and motion in limine regarding "the ring", conversations between Gary Engel and Thomas McKillip and statements by Gary Engel to Sharon Dugan. jeh

Oct 8, 1991 APA appears. Defendant appears personally and by counsel. Jury being present, voire dire exam conducted. Jury selected and sworn to try cause. Jury admonished and noon recess taken. FCJEH

Oct. 8, 1991 APA appears. Defendant appears personally and by counsel. Outside hearing of jury, argument heard on defendant's motion to dismiss. Defendant's motion in limine regarding the ring, argued and submitted. Motion in limine regarding alibi defense argued and submitted. Motion to dismiss overruled. Separate motion in limine taken with cause. Jury being present, jury instructed and state makes opening statement. Defendant makes opening statement. State adduces evidence and cause not being concluded, jury admonished and evening recess taken. FCjeh

Oct. 9, 1991 APA appears. Defendant appears personally and by counsel. Jury being present, State adduces further evidence and cause not being concluded, jury admonished and noon recess taken. FCjeh

Oct. 9, 1991 APA appears. Defendant appears personally and by counsel. Jury being present, State adduces further evidence and outside hearing of jury, Court finds that defendant is a prior offender within meaning of MoR.S. and as per findings made of record this date. State rests. Defendant's attorney orally moves for judgment of acquittal. Same denied. Defendant adduces evidence and rests. State concludes evidence in rebuttal. All evidence closed. All witnesses excused. Jury admonished and evening recess taken. FCjeh

Oct. 10, 1991 APA appears. Defendant appears personally and by counsel. Defendant orally moves for judgment of acquittal at close of all evidence. Same submitted and by Court overruled. Jury being present, jury instructed by Court. Instructions No. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, & 17. State makes argument. Defendant makes closing argument. State makes closing argument. Bailiff sworn and jury retries at 11:00 a.m. FCJEH

Oct. 10, 1991 APA appears. Defendant appears personally and by counsel. Jury returns into open court at 4:00 pm and advises that they are unable to reach a verdict and that further deliberation will be of no benefit. Court declares mistrial and orders jury discharged. Cause reset for trial

11/05/1991. Jury panel 50 jurors ordered. FCjeh

Oct. 30, 1991 Transcript of evidence adduced at trial and transcript of hearing regarding Marlies Vukelich filed. jeh

Oct. 30, 1991 Defendant files motion to make indictment more specific and suggestions in support of motion. jeh

Nov. 5, 1991 Defendant files motion in limine regarding alleged attempt to fabricate alibi defense. dkt

Nov. 5, 1991 Defendant files motion in limine regarding "The ring", conversations between Gary Engel and Thomas McKillip and statements by Gary Engel to Sharon Dugan. dkt

Nov. 5, 1991 Defendant files motion to dismiss with memorandum of points and authorities. dkt

Nov. 5, 1991 Prosecuting attorney appears by assistant prosecuting attorney. Defendant appears personally and by counsel. State having disclosed evidence which requires expert testimony by defense, Defendant orally moves for continuance to permit defendant to secure such testimony. By agreement of parties, cause reset for trial 01/21/1992 at 9:00 am. Jury panel of 60 jurors ordered. State given leave to file information in lieu of indictment. Same filed. Formal arraignment waived. Please of not guilty entered in counts I, II, III and IV. FC/jeh

Nov. 12, 1991 Cause set 01/22/1992 at 9:00 am. FC/jeh

Jan. 21, 1992 State files response to defendant's motion in limine regarding "the Ring" conversations between Engel and McKillip and defendant's attempt to fabricate an alibi defense. jeh

Jan. 22, 1992 P.A. appears by Assistant P.A. Defendant appears personally and by counsel. Parties announce ready. Jury panel being present, voire dire examination conducted. Jury and one alternate Brian Moffett selected and sworn to try cause. Jury admonished and noon recess taken. FCjeh

Jan. 22, 1992 APA appears. Defendant appears personally and by counsel. Jury being present, jury instructed by the Instructions No. 1 and 2. State makes opening statement. State adduces evidence. FCjeh

Jan. 23, 1992 Assistant P.A. appears. Defendant appears personally and by counsel. Jury being present, State adduces further evidence and outside hearing of jury State adduces evidence on prior and persistent offender. Court finds that defendant is a prior and persistent offender as found of record this date. State rests. Defendant orally moves for verdict of acquittal at close of State's evidence. Same submitted without argument and by court overruled. FCjeh

Jan. 23, 1992 Assistant Prosecuting Attorney appears. Defendant appears personally and by counsel. Jury being present, defendant adduces evidence and rests. Defendant orally moves for judgment of acquittal at close of all evidence. Same

submitted to by court overruled. Jury admonished and evening recess taken. FCjeh

Jan. 24, 1992 Assistant Prosecuting Attorney appears. Defendant appears personally and by counsel. Jury being present, jury instructed by Instructions No. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. State makes argument. Defendant makes argument. State makes closing argument. Bailiffs sworn. Jury retires at 10:40 AM to consider its verdict. FCjeh

Jan. 24, 1992 Assistant Prosecuting Attorney appears. Defendant appears personally and by counsel. Jury returns into open court at 4:50 PM its' verdicts finding defendant guilty as charged on Counts I, II, III & IV. Verdicts received and are filed. Jury discharged. For good cause shown defendant granted 10 additional days for a total of 25 days to file motion for new trial. Probation and Parole to make P.S.I. and report to this court with same by 03/27/1992. Probation and Parole authorized to interview defendant with prior consent of counsel of record. State motion to withdraw bond denied at this time. Same being fixed at $5,000,000.00 as previously set. FCjeh

Feb. 6, 1992 Cause reset 04/03/1992 at 10:00 am. FCjeh

Feb. 10, 1992 Cause continued to 04/10/1992 @ 10:00 am. jeh

Feb. 18, 1992 Defendant files motion for judgment of acquittal or, in the alternative, for new trial with memorandum of points and authorities. jeh

April 9, 1992 Trial court copy of transcript of January 23, 1992 trial filed. jeh

Apr. 10, 1992 P.A. comes by A.P.A.; Defendant comes personally and by counsel. Motion for new trial submitted without oral argument and by court overruled. P.S.I. received and portions deleted as part of court's consideration. Defendant makes oral statement. As to Counts I and III and IV, punishment fixed at 50 years on each count. All sentences ordered to be served consecutively with each other. Allocution, judgment and sentences. Defendant to receive credit for jail time to date. Sheriff authorized 1 deputy to transfer defendant to MO Department of Corrections. Attorney for defendant Byron Fox to file notice of appeal. Said attorney given leave to withdraw upon MO State Public Defender assigning counsel to represent defendant on appeal and to file such pleadings as may be deemed necessary to preserve post conviction remedy.

Apr. 10, 1992 State Public Defender authorized to determine indigency. Defendant given leave to proceed as poor person. FC/jeh

Apr. 14, 1992 Notice of appeal, criminal case information, filed. bay

Apr. 22, 1992 Notice of appeal, criminal case information, $50.00 filing fee by certified mail to Peggy Stevens, Clerk, Missouri Court of Appeals, Western District, 1300 Oak St., K.C., Mo. 64106; and by certified mail to William L. Webster, Attorney General of Missouri, P.O.

Box 899, Jefferson City, MO 65102; hand delivered to Clay County P.A. bay

Apr. 27, 1992 Return receipt of certified mail to William Webster, Atty. General filed. jeh

Apr. 29, 1992 Return receipt of certified mail to MO Court of Appeals filed. jeh

July 13, 1992 Trial court copy of legal file filed. jeh

July 13, 1992 Trial court copy of transcript filed. jeh

AFFIDAVIT OR COMPLAINT IN FELONY CASE

STATE OF MISSOURI)
)
County of Clay)
No. CR190-1699F

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
ASSOCIATE DIVISION 6

THE STATE OF MISSOURI)
Plaintiff)
vs.)
STEVEN L. MANNING w/m 11/28/50)
a/k/a Steve T. Manning, Steve P.)
Manning, Etienne S. Duvalier)
822 N. Rockwell, Chicago, Illinois)
(or) 2606 W. Rice, Chicago, Illinois)
Defendant.)

COUNT I

A. Rex Gabbert, Assistant Prosecuting Attorney, Clay County, Missouri, being duly sworn, charges that the defendant, in violation of Section 565.110, RSMo, committed the Class A felony of kidnapping punishable upon conviction under Sections (s) 558.011.1(1) RSMo, in that on or about February, 1984, in the County of Clay, State of Missouri,, defendant unlawfully removed Charles Ford without his consent from the Knollwood Apartments, 4700 N. Highland, Kansas City, Missouri, the place where he was found by defendant, for the purpose of holding said Charles Ford for ransom for the release of said Charles Ford.

COUNT II

A. Rex Gabbert, Assistant Prosecuting Attorney, Clay County, Missouri, being duly sworn, charges that the defendant, in violation of Section 571.015 RSMo. committed the class A felony of armed criminal action punishable upon conviction under Section 571.015.1 RSMo. in that on or about February, 1984, in the County of Clay, State of Missouri, defendant committed the felony of kidapping charged in Count I, all allegations of which are incorporated herein by reference, and the defendant committed the foregoing felony of kidnapping by, with and through the use, assistance and aid of a deadly weapon.

COUNT III

A. Rex Gabbert, Assistant Prosecuting Attorney, Clay County, Missouri, being duly sworn, charges that the defendant, in violation of Section 565.110 RSMo. committed the class A felony of kidnapping punishable upon conviction under Sections 558.011.1(1) RSMo. in that on or about February, 1984, in the County of Clay, State of Missouri, defendant unlawfully removed Mark Harris without his consent from the Knollwood Apartments, 4700 N. Highland, Kansas City, Missouri, the place where he was found by defendant, for the purpose of holding said Mark Harris for ransom for the release of said Mark Harris.

COUNT IV

A. Rex Gabbert, Assistant Prosecuting Attorney, Clay County, Missouri, being duly sworn, charges that the defendant, in violation of Section 571.015 RSMo. committed the class A felony of armed criminal action punishable upon conviction under Section 571.015.1 RSMo. in that on or before February, 1984, the County of Clay, State of Missouri, defendant committed the felony of kidnapping charged in Count II, all allegations of which are incorporated herein by reference, and

the defendant committed the foregoing felony of kidnapping by, with and through the use, assistance and aid of a deadly weapon.

Affiant further states that the facts set forth in said complaint are true, according to his best information, knowledge and belief.

\s\ _____
Asst. Prosecuting Attorney

Subscribed and sworn to before me this 20th day of July, 1990.

\s\ _____
Division Clerk

BOND SET: $7,500,000

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor

STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-3825

Counsel for Petitioner

March, 2003